

IN THE SUPREME COURT OF THE UNITED STATES

No. _____

SEAN WEISNER

Petitioner

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

Respondent

Petition for Writ of Certiorari to the
United State Court of Appeals for the Fifth Circuit

Petition for A Writ of Certiorari...

Questions Presented

- 1) Does the clarification made by this court in (2002) ruling, *Corey v. Saffold* 122 S.Ct. 2134, constitute the 5th Circuit court as being contrary to clearly established Federal law, as well as in direct violation of petitioner Weisner's due process rights, when indeed Federal Habeas was timely; but was time barred because of the 5th Cir court made up rule (Regardless of when mandate issues)...?
- 2) Does a Trial Counsel render effective assistance, when he fails to halt All trial proceeding and do a further competency inquiry of his client mental state because circumstance of the follow factor come before him doing trial and before trial?
 - (A) His client is suffering from a present serious mental illnesses Paranoid Schizophrenic
 - (B) Because of mental illnesses, his client is deem to be separated from reality "doing trial"
 - (C) His client is delusional and tries to commit suicide [doing trial proceeding] do to mental illnesses
 - (D) Trial Counsel was advised in advance of trial his client needed more medical (help), and probe again by Dr. Tedford (Expert) doing trial proceeding
- 3) Because State Court of last ^{resort} ~~resort~~ is without jurisdiction to entertain an application for 11.07, until issuance of mandate on direct appeal, but the 5th Circuit court starts the 1yr limitation clock for 2254(d) regardless of when mandate issues, are they violating Petitioners due process rights under 28 U.S.C.S. § 2244(d)(2)
- 4) Whether the unresolved conflict amongs Jurists of reason within the 5th Circuit court and other sister Circuit courts about U.S.C.S. 28 § 2244(d)(2)
: To be continue next page:

is denying Petitioners due process 5th and 14th amendments, when the 5th Cir Court place time bar on Constitutional merits on those who may not be time barred do to a reasonable possibilty of misconstruing of the Statutory?

5.) Whether it would be an issue that's debatable, amongs any Reasonable Jurists for [COA] for procedural time bar on Constitutional merits [IAC], where trial counsel [Perjury] to conceal his violation of the 5th, 14th amends under Pate v. Robinson 86 S.Ct. 836, 842 and Drope v. Missouri 95 S.Ct. 896 (1975) as well as 6th amend under Strickland v. Washington 104 S.Ct. 2052 (1984), were in factual basis of the claims were adequately showed?

6.) Whether Petitioner Weisner, was indeed entitled to Equitable Tolling for all the time that Texas Court of Criminal Appeals held his application for petitan for discretionary review in continuance, until the issuance of Mandate December 19th 2013?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page...

SEAN WEISNER - petitioner

LORIE DAVIS, DIRECTOR (TDCJ) - Respondent

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TABLE OF AUTHORITIES CITED

State case: *Carter v. State* 512 S.W. 3d 323, 324 (Tex Crim App 1914) page 8.
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Federal case: *Nyland v. Moore* 216 F.3d 1264 page 8.

Payne v. Kemna 441 F.3d 570 page 8.

Van Duren v. Cockrell No. 00-20899 Fed App 833 page 7.

Supreme Court: *Carey v. Stiffold* 122 S.Ct. 2134 (2002) page 7.

Drope v. Missouri 95 S.Ct. 896 (1975) Question #5.

Lochor v. Thomas 116 S.Ct. 1293 (1996) page 7.

Pate v. Robinson 86 S.Ct. 836, 842 Question #5.

Strickland v. Washington 104 S.Ct. 2052 (1984) Question #5.

STATUTES AND RULES: U.S.C.S. 28 § 2244(d)(1)(A) and (d)(2) page 7, 5,

U.S.C.S. 28 § 2254 (b)(1)(A) page 8. § 2254(d) Question #3.

U.S.C. 18 § 1621. (1) page 5. and Question #5.

In The
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of this United States court of appeals appears a Appendix A. to petition and has been designated for publication but is not yet reported;

The opinion of the United States district court appears at Appendix B. the petition and has been designated for publication but is not yet reported;

JURISDICTION

The date on which the United States Court of Appeals decided my case was 6-4-18

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: June 21, 2018, and a copy of the order denying rehearing appears at Appendix A/A3

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

V. Amendment: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in case arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

VI. Amendment: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the States and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence

XIV Amendment, Sec 1. All person born or naturalized in the United States, and subject to the jurisdiction thereof, are citizen of the United States and State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of Citizen of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S.C.S. 28 § 2244 Finality of determination

(1)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of State court. The limitation period shall run from the latest of - the date on which the judgment become final by the conclusion of direct review or the expiration of the time for seeking such review;

(1)(A) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

U.S.C.S. 28 § 2254(1)(A) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State;

18 U.S.C. § 1621. Whoever (1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, disposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both...

STATEMENT OF THE CASE

Weisner was charge and convicted of 1 Count Agg-Assault-DW and 1 Count Agg-Assault-DW-SB-FV... In a [Slow Plea] trial Weisner, was sentence to a 10yr and 70 yr term ran (CC) to TDCJ. Weisner than took the necessary steps to exhaust all his State court remedies, but still was denied relief: Weisner than filed a federal Habeas Corpus in the Northern District Court, showing 9 constitutional merits with 5 being [IAC] ineffective assistance of counsel error and 4 being [Abuse of Discretion] violation and also asserting that the State court (Ruling) was indeed contrary to established federal law; Weisner's Federal habeas writ was deem time barred under the AEDPA 1yr statute of limitations period for Federal habeas proceeding, dismissing merits without reaching them. Weisner rebuttal this presumption by identifying that United States Magistrate Judge errored in his findings with filing dates by Petitioner (See: Appendix B. ~~10B3~~ highlighted area) as well as miscalculation issues as to time tolled. As so, Federal Habeas was still dismissed as time barred and [COA] denied as well in district court. Weisner than appeal to the 5th Circuit Court of Appeals for [COA] with doing so, bring to the Court's attention for a 3rd time the issue of (Perjury) under 18 U.S.C. § 1621⁽¹⁾ made by trial counsel; In order to conceal his "Extrem" deficient performance (See: Appendix D. ~~10D1~~ ~~10D2~~) clearly and convincing evidence that adds up to [IAC] and Weisner challenged the 5th Circuit Court Rule (Regardless of when mandate issues) use to time bar petition - asserting that it conflict with other Sister Circuit Courts and that it's well contrary to this Supreme Court Law, as well as Law made by Congress 28 U.S.C.S. § 2244(d)(2)... Now, Weisner is appealing to this honorable Supreme Court for clarification and a chance for constitutional merits to be final heard...

REASONS FOR GRANTING THE PETITION

[Importance of the Question Presented] are of great public importance because they affected the operation of how 28 U.S.C.S. § 2244(d)(2) is applied by all 50 states, The District of Columbia and hundreds of cities As well. This Honorable Supreme Court states that it will accept a case for review that a conflict between the decision of which review is sought and a decision of another appellate court on the same issue... [AS in this instant case at hand]

As not to waste this Honorable court time or patience, as a full lay-man of Law, I understand fully, that this court is well verse with Federal Statutes: Thus, the 5th Circuit court has come to a different conclusion than this Honorable Supreme Court as well as other sister circuits courts as to how 28 U.S.C.S. § 2244(d)(2) is to be applied. Making a unresolved conflict amongs jurists of reason within the 5th cir court and other appellate circuit courts, about State court of last resort mandate being the time that starts the clock for Federal Habeas 1yr limitation period pursuant to § 2244(d)(1). And so, there decision made within this instant case at bar conflicts with other circuit appellate court and this Honorable Court as well...

The § 2244(d)(2) textual charateristice and the statute's basic purpose rebut this presumption set forth by 5th circuit court [Regardless of Mandate Issues] Rule... Further so, the 5th Cir states that the rulings made by their sister court's in (11th Cir) Nyland v. Moore 216 F.3d 1264, 1267, (8th Cir) Payne v. Kemna 441 F.3d 570, are contrast to the (9th Cir) that once held that it would not apply a state Law that view issuance of the mandate as establishing finality to determine

When a state conviction become final; [A split that is found within the district courts of the 5th circuit] as well. "Finally" in an unpublished opinion within the 5th cir stating that it was not plan error for a district court to hold that for purpose of § 2244(d)(1)(A) the date that State appellate court issues its mandate is not controlling. [However that opinion did not expressly reject the Application of State law either:] At - VanDuren v. Cockrell No. 00-20899 Fed App 833

Furthermore, Thus 5th Circuit Court has either strayed away from the Statutory language § 2244(d)(2), or possibly misconstrued it. Their error is causing great harm to (petitioners) and Weisner's constitutional rights as a whole; For the fact that 5th cir courts are denying (petitioners) an opportunity to allow their constitutional merits to be heard at all! [This very court] States in *Loch v. Thomas* 116 S.Ct. 1293 (1996) "Dismissal of a first habeas petition is a particularly serious matter, for that dismissal denies the petitioner protections of the Great Writ entirely, risking injury to an important interest in human Liberty" (Because they are time barred by a made up 5th Circuit Court Rule...)

Because the governing federal law, in turn requires an examination of the states court procedures; In *Carey v. Saffold* this Honorable Supreme Court instructed that an application is pending [for purpose of Section § 2244(d)(2)] as long as the ordinary state collateral review process is "in continuance" i.e. "Until the Completion" of that process...
Carey v. Saffold 122 S.Ct. 2134 (2002)

Petitioner Weisner's direct appeal was not final until Dec 19, 2013 Please! (See: Appendix B.) State collateral review was "pending" until Texas Court of Criminal Appeals issued its mandate. (In very Plain Language it is

explan to Applicant) - Although a court of Appeals may have initially issued its opinion, while a motion for rehearing or petition for discretionary review is viable, the direct appeal continues. A direct appeal is final when mandate from the Court of Appeals issues [Carter v. State 510 S.W. 2d. 323, 324 (Tex Crim App 1974)]

Furthermore, the Court of Criminal Appeals does not have jurisdiction to consider an 11.07 writ of habeas until direct appeal is final [Ex Parte Mark Anthony 12 S.W. 3d. 472. (Tex Crim App)] As stated before this honorable Supreme Court is well verse with Federal Statutes, and knows a petitioner must follow the guidelines under 28 U.S.C. § 2254(b)(1)(A) to be even entertain by a Federal Court period...

Petitioner Weisner assert's that 5th Cir Courts counted Oct 23, 2013 through Dec 19, 2013 against his time for the 1yr limitation period for Federal Habeas; When indeed they were not suppose too. The district court ruled that [Regardless of mandate issuanace] from state court of last resort, the time for starting the clock for purpose of § 2254 1yr. limitation starts when the opinion give (See: Appendix B / B3) they are contary to established federal law as a whole...

Conclusion

This Honorable Supreme Court, presumes that Congress expects its Statutes to be read in conformity with Court's precedents, as to secure uniformity within the way § 2244(d)(2) is appealed by (All) Circuit Courts as whole. Petitioner Weisner ask this Honorable Court to step in and provide "Clarification" to resolve an on going conflict...

Respectfully Submitted
Sean Weisner #1718500
Date: 7-18-18