ORIGINAL

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

LAMAR ATU BLACKWELL— PETITIONER

vs.

MATTHEW HANSEN— RESPONDENT,

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Lamar Atu Blackwell
CDOC #
Sterling Correctional Facility (SCF)
12101 State Highway 61/PO BOX 6000
Sterling, Colorado 80751

QUESTION(S) PRESENTED

I. Whether this Court's opinion in *Webb v. Texas*, 409 U.S. 95, 93 S. Ct. 351, 34 L. Ed. 2d 330 (1972) applies to prosecutors as well as judges;

II. Whether the unreasonable application standard set forth in 28 U.S.C. § 2254(d) is distinguishable from the Strickland standard, and whether a petitioner must address both prongs of Strickland in order for unreasonable application to be found;

III. Whether this Court's holding in *Swarthout v. Cooke*, 562 U.S. 216 (2009) implies that a State's failure to follow its own postconviction procedural rules can violate due process.

LIST OF PARTIES

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

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows

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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

[x] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____;
or,
[ ] has been designated for publication but is not yet reported;
or,
[x] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____;
or,
[ ] has been designated for publication but is not yet reported;
or,
[x] is unpublished.

[ ] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____;

or,

[ ] has been designated for publication but is not yet reported;

or,

[ ] is unpublished.

The opinion of the _____court appears at Appendix _____to the petition and is

[ ] reported at _____;

or,

[ ] has been designated for publication but is not yet reported;

or,

[ ] is unpublished.

JURISDICTION

[x] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was February 5, 2018.

[x] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix ____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ _____(date) on _(date) in Application No. _____A _____.

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

[ ] For cases from state courts:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date:

_____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No. _____A ___.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. 6:

"In all criminal prosecutions the accused shall enjoy the right. . .to have compulsory process for obtaining witnesses in his favor."

U.S. Const. Amend. 6:

"In all criminal prosecutions the accused shall enjoy the right. . .to have the assistance of counsel for his defense."

U.S. Const. Amend. 14, § 1:

"No state. . .shall deprive any person of life, liberty or property without due process of law. . ."

28 U.S.C. § 2254(d)(1):

"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 with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . .resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . ."

STATEMENT OF THE CASE

Mr. Blackwell filed a 28 U.S.C. § 2254 Application in the United States District Court for the District of Colorado on March 9, 2017, raising three claims for relief: (1) the prosecutor violated due process by interfering with a defense witness' decision whether to testify; (2) his trial attorneys were ineffective because they failed to adequately investigate certain witnesses; and (3) the state court violated due process by denying his motion for postconviction relief based on newly discovered evidence without a hearing..

On April 14, 2017, the district court dismissed Mr. Blackwell's Third Claim after finding that it was not cognizable because it was an issue of state law. On June 26, 2017, the district court ruled on the merits of Mr. Blackwell's remaining claims and dismissed them, finding that the State of Colorado had not decided them unreasonably. No Certificate of Appealability was granted.

Mr. Blackwell filed a "Combined Opening Brief and Request for Certificate of Appealability in the Tenth Circuit Court of Appeals on September 26, 2017. On February 5, 2018, the Tenth Circuit ruled that Mr. Blackwell's Third Claim was not cognizable under federal law because it focused only on Colorado's "post-conviction remedy" and not the underlying convictions. The Tenth Circuit denied the First Claim by finding that the factual circumstances were materially distinguishable from those at issue in this Court's opinion in *Webb v. Texas*, 409 U.S. 95, 93 S. Ct. 351, 34 L. Ed. 2d 330 (1972).

With respect to the ineffective assistance of counsel issue (Claim Two), Mr. Blackwell argued that habeas review of his underlying issue should be had because the State Court unreasonably applied the *Strickland* standard to his claim. The Tenth Circuit ruled that, pursuant to 2254(d)(1), "unreasonable application" only exists in claims of

ineffectiveness if the State is unreasonable with respect to *both* of *Strickland's* prongs. Because Mr. Blackwell only argued that the State unreasonably applied the deficient performance prong of *Strickland,* the Tenth Circuit found that habeas review was unavailable to him.

REASONS FOR GRANTING THE PETITION

I. The Tenth Circuit has erroneously limited the scope of *Webb v. Texas*, 409 U.S. 95, 93 S. Ct. 351, 34 L. Ed. 2d 330 (1972).

In *Webb v. Texas*, 409 U.S. 95, 93 S. Ct. 351, 34 L. Ed. 2d 330 (1972), the Court reviewed whether it was a violation of a criminal defendant's due process rights when a trial judge unnecessarily singled out a defendant's witness and warned him that if he testified he would be subject to perjury charges. After this warning, the witness refused to testify and was excused by the court. In reversing the State court, the Supreme Court recognized that a defendant's right to present a defense is not absolute, but held that the government may not substantially interfere with the testimony of witnesses. Webb v. Texas, 409 U.S. 95, 98 (1972).

In my case, the panel of the Tenth Circuit interpreted *Webb* narrowly. In the panel's view *Webb* only applies to instances where the governmental warning comes from a judge. This is in conflict with published decisions from other panels of the Tenth Circuit. *United States v. Smith,* 997 F.2d 674, 680 (10th Cir. 1993)("Judges *and prosecutors* do not necessarily commit a Webb-type violation merely by advising a witness of the possibility that he or she could face prosecution for perjury.")(emphasis added).

The panel's decision is also in conflict with the majority of Circuits which have interpreted *Webb* as extending to undue perjury threats from other governmental actors.

United States v. Blackwell, 694 F.2d 1325, 1334 (D.C. Cir. 1982); *United States v. Williams*, 205 F.3d 23, 29 (2d Cir. 2000); *United States v. Morrison,* 535 F.2d 223, 227-228 (3rd Cir. 1976); *United States v. MacCloskey,* 682 F.2d 468, 479 (4th Cir. 1982); *United States v. Jackson,* 935 F.2d 832, 846-847 (7th Cir. 1991); *United States v. Washington*, 318 F.3d 845, 855 (8th Cir. 2003); *United States v. Vavages*, 151 F.3d 1185, 1189 (9th Cir. 1998).

In those circuits where the federal courts of appeals have not explicitly interpreted *Webb* as extending to prosecutorial threats, the state courts have done so. See, *e.g., State v. Fagone,* 462 A.2d 493, 496-497 (Me. 1983); *Davis v. State*, 831 S.W.2d 426, 437 (Tex. Crim. App. 1992); *Hendrix v. State*, 82 So. 3d 1040, 1043 (Fla. 2011).

The Court has never explicitly ruled whether *Webb* was strictly limited to the precise factual scenario at issue there. The Court should grant *certiorari* to definitively state that the principle annunciated in *Webb* rightly applies to prosecutors. The right to present a defense through witnesses is arguably one of the most critical components to the just functioning of our criminal system. And it is an injustice that the panel in my case refused to recognize this principle as being clearly established.

II. The Tenth Circuit Has Wrongly Determined that a Review for Deference Under 28 U.S.C. § 2254(d) Is Identical to a Review of the Underlying Merits of a Constitutional Claim—a Distinction the Court Should Clarify.

As this Court is well aware, in a § 2254 habeas review deference is owed to the State courts, and federal courts will not review the underlying constitutional claims unless the petitioner can demonstrate that the State decision on the claim was (1) contrary to federal law, (2) involved an unreasonable application of federal law, or (3) involved an unreasonable determination of the facts. 28 U.S.C. § 2254(d).

Though this Court has never explicitly said so, the determination of whether a State decision involved an unreasonable application is separate and distinct from a review of the underlying constitutional claim. The two types of review have different standards adopted to address very different aims. The unreasonable application standard was adopted to ensure that federal courts do not unfairly intrude on a State's prerogative of administering its judicial system. *Cullen v. Pinholster*, 563 U.S. 170, 185 (2011)(noting that the purpose of § 2254(d)(1) is to afford state courts comity). In contrast, the ineffective assistance of counsel standard was adopted to ensure that criminal defendants who were not represented by effective attorneys had an avenue of relief. *Strickland v. Washington*, 466 U.S. 668, 671 (1984).

The Tenth Circuit conflated the standards of ineffective assistance and unreasonable application when it ruled I had failed to demonstrate unreasonable application by not addressing both prongs of the *Strickland* standard. See Attached Slip Op. at 6-8; *Blackwell v. Hansen*, 2018 U.S. App. LEXIS 2797, ¶ 7-9. While it is true that failure to address one of *Strickland's* prongs is a fatal error on an ineffectiveness claim, unreasonable application is not so limited. The critical consideration under unreasonable application is not whether a habeas petitioner's underlying claim will ultimately prevail, but whether a review of it may even be had—whether deference is owed to the State's decision on the claim. *Cullin, supra.*

In my initial habeas application to the federal district court I thoroughly addressed both prongs of *Strickland* as well as the unreasonable application standard. I was not presenting an initial habeas application to the Tenth Circuit—I was challenging whether the federal district court's legal determinations were correct and seeking a remand for

further proceedings. Therefore, it was appropriate to focus on what was flawed in the federal district court's orders regarding my claims, rather than to simply relitigate them. Because the district court found that the State courts had not unreasonably applied federal law it did not look into my claims further and actually consider them on their merits. In my appeal to the Tenth Circuit I was simply seeking a remand to the district court for a fair determination of the merits of my ineffective assistance of counsel claim.

The Tenth Circuit's erroneous conflation of the § 2254(d)(1) standard and the ineffective assistance standard should be corrected by this Court—not just for the benefit of the Tenth Circuit, but for other courts in this country too.

III. The Tenth Circuit Erroneously Ruled that State Post-conviction Rules May Never Implicate the Fourteenth Amendment.

In conjunction with my ineffective assistance of counsel claim (discussed above), I filed a newly discovered evidence claim in the State district court under Colo. Crim. P. Rule 35(c). The substance of my claim was that my co-defendant—who was the principle witness against me at my trial—had recanted his testimony. He was a juvenile at the time, was highly pressured by the district attorney in the case, and was given an eight year deal in exchange for his testimony against me. When contacting me to tell me he wanted to recant, my co-defendant stated "I have a lawyer for my appeal right now, and I told her when I was younger I was pressure [sic] by the DA to say thing [sic] that was not true, I'm willing to make that right, I don't know if that will make you [sic] situation better, but God put that on my heart."

The Court has ruled that "When [] a State creates a liberty interest, the Due Process clause requires fair procedures for its vindication—and federal [habeas] courts will review the application of those constitutionally required procedures." *Swarthout v.*

Cooke, 562 U.S. 216, 220 (2009). Stated differently, when there is a liberty interest involved due process requires a State to fairly follow its own laws. *E.g. Vansichel v. White,* 166 F.3d 953, 956 (9th Cir), *cert denied,* 528 U.S. 965 (1999); *Echols v. Thomas*, 33 F.3d 1277 (11th Cir. 1994)(per curiam), *cert denied*, 516 U.S. 1076 (1996). A state creates a livery interest if it places substantive limitations on the discretion of the decision maker, thereby raising a justifiable expectation that if those limiting criteria are met relief will be obtained. *Olim v. Wkinekona*, 461 U.S. 238, 249-50 (1983).

In my Third Claim for habeas relief I argued that the State violated my right to Due Process when it unfairly departed from the mandatory procedures set forth in Colo. Crim. P. Rule 35(c) and C.R.S. § 18-1-410(1)(e). The Tenth Circuit and the federal district court both refused to consider this claim, finding that it was solely an issue of State law. These rulings are clearly contrary to the above authorities which state that when there is a liberty interest involved the Due Process clause is implicated. The Court should grant *certiorari* to consider the relation of the due process authorities and principles above with respect to state post-conviction proceedings.

Colorado has created a liberty interest in newly discovered evidence claims. Pursuant to Colo. Crim. P. Rule 35(c)(2)(V) and C.R.S. § 18-1-410(1)(e), a meritorious newly discovered evidence claim "requires vacation of the conviction or sentence in the interests of justice." Under established post-conviction procedure, a district court must allow a defendant who raises a newly discovered evidence claim an evidentiary hearing "unless the motion, the files, and the record clearly establish" the defendant is not entitled to relief. Colo. Crim. P. Rule 35(c)(3)(IV) and (V); *Kazadi v. People,* 2012 CO 73, ¶ 17. In other words, ambiguity regarding the effect of newly discovered evidence must

be resolved through the procedural protections of an evidentiary hearing. *People v. Tomey*, 969 P.2d 785, 788 (Colo. App. 1998).

C.R.S. § 18-1-410(1)(e) explicitly state that if newly discovered evidence is raised it "justif[ies] a hearing thereon." This procedural protection is buttressed by section (2)(a) of 18-1-410, which states that "procedures to be followed in implementation of the right to postconviction remedy shall be as prescribed by rule of the supreme court of the state of Colorado." As noted above, Colo. Crim. P. Rule 35(c)(3)(IV) and (V) mandate a hearing. Further, Colorado has made clear that it intended strict due process protections with respect to newly discovered evidence claims. C.R.S. § 18-1-401, which governs 18-1-410(1)(e), states:

> It is the intent of this part 4 to confer upon every person accused of an offense the benefits arising from said part 4 *as a matter of substantive right,* in implementation of minimum standards of criminal justice *within the concept of due process of law*. (emphasis added)

My newly discovered evidence claim was such that it warranted an evidentiary hearing. Pursuant to Colo. Crim. P. Rule 35(c)(3)(IV) and (V), the state district court made a determination that my claims were not clearly meritless—it did this when it ruled that an attorney be appointed to represent me in further post-conviction proceedings. The attorney investigated my newly discovered evidence claim and was prepared to argue it at the forthcoming evidentiary hearing. However, the state district court then denied me that opportunity and denied the newly discovered evidence claim.

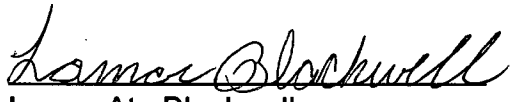
This issue was a cognizable federal habeas corpus claim, and the Tenth Circuit should have so found. It should have granted my appeal, and ordered the lower federal district court to consider the issue and provide appropriate relief. I respectfully ask that

this Court now grant *certiorari* in order to make this area of the law more clear for the lower courts in this country, and to afford me justice by remanding my case back to the lower courts for further proceedings.

CONCLUSION

For the above reasons, the Court should grant *certiorari* in this case.

Respectfully Submitted this 5th day of May, 2018.



Lamar Atu Blackwell, *pro se*