NO. 18-7291

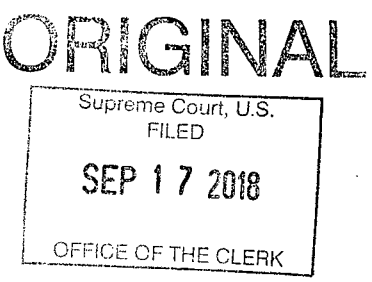
IN THE

SUPREME COURT OF THE UNITED STATES

DILLON WADE THOMPSON - Petitioner;

v.

LORIE DAVIS - Respondent;



Petition for Writ of Certiorari

Attorney for Petitioner:

Dillon Wade Thompson
TDCJ# 1696004
Bill Clements Unit
9601 Spur 591
Amarillo, TX 79107

Petitioner / pro se

QUESTIONS PRESENTED

1. Is it a violation of a defendant's Due Process rights if, while deliberating, the fact-finder viewed evidence that was not shown at trial, even if said evidence was submitted as a large electronic batch of evidence along with evidence that was shown dur- trial?
2. What can be done to prevent prosecutors and courts from over- reaching the phrase 'lewd exhibition of the genitals'?
3. Can this Court do something to stop digital cameras from being treated as murder weapons?

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JURISDICTION

For cases from federal courts:

The date on which the United States court of appeals decided my case was May 07, 2018.

A copy of that decision appears at Appendix A.

A timely petition for rehearing was denied by the United States court of appeals on the following date: June 19, 2018, and a copy of the order denying rehearing appears at Appendix B.

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

STATEMENT OF THE CASE

In 2009 and 2010, Petitioner was indicted on four Cause Numbers with twenty-five Counts between them. These were all joined into a single criminal action and were all tried together. Following a two day bench trial in 2011, Petitioner was convicted of one count of indecency with a child, seven counts of sexual performance by a child, and seventeen counts of possession of child pornography. As punishment, the trial judge assessed a stacked sentence of fifty-five years in prison and a total of $32,500 in fines.

On June 9, 2014, Petitioner filed a 2254 petition with the U.S. District Court, Northern District of Texas, Amarillo Division. The Civil Number for that was 2:14-CV-00139.

On September 28, 2017, the District Court entered a final judgment denying the §2254 petition. Petitioner then filed an Application for Certificate of Appealability with the U.S. Court of Appeals for the Fifth Circuit, Cause No. 17-11297.

The Fifth Circuit denied the Application for a COA, and then Petitioner filed a petition for rehearing. That was denied by the Court on June 19, 2018.

REASONS FOR GRANTING THE WRIT

Question 1.) Is it a violation of a defendant's Due Process rights if, while deliberating, the fact-finder viewed evidence that was not shown at trial, even if said evidence was submitted as a large electronic batch of evidence along with evidence that was shown during trial?

Here are the events that led to the fact-finder viewing a mix of evidence shown at trial and evidence not shown at trial during deliberations:

- The State admitted 3 CD-ROM's into evidence (RR vol 5, pg 156, and RR vol 6, pg 26). These 3 CD-ROM's contained 1,326 digital media files, making them not just 3 exhibits, but 1,326 exhibits.
- During the State's case in chief, they presented in court only 23 photos and videos in support of 24 counts (RR vol 6, pgs 28-48).
- The State rested (RR vol 6, pg 56).
- The Defense moved for an instructed verdict of not guilty on the count that no evidence was presented for (Id.).
- The State responded to the motion by saying there were hundreds of images "in evidence before the Court" even though no one in the courtroom, other than the prosecution, had ever seen them (Id, pg 57).
- The trial judge says that because "there's so much evidence," he will delay ruling on the motion until he has had "an opportunity to look at everything," (RR vol 6, pg 58).
- The State presented a small number of more photos and videos during cross examination of the defendant, however, 1) it was for impeachment, 2) on collateral matters, 3) that the State improperly opened their own door to. (RR vol 6, pgs 101-141).
- The State and the Defense closed (RR vol 6, pg 156).
- The Trial Court takes a week recess to look at everything (Id.).
- After recess, the Judge returns a verdict of guilty on all counts, including the count where no evidence was properly presented for it during trial. (RR vol 7, pgs 24-30).

I am not sure if the Trial Court knew about Texas Rules of Appellate Procedure, Rule 21.3(f), which states, "The defendant must be granted a new trial ... when, after retiring to deliberate, the jury has received other evidence." The State forced him to follow these steps. The State basically told the Trial Judge, 'Please retire, and while the Defense is not around, go look at over 1,000 other files, most of which were not shown in the court-room, and convict on that.' I struggle to think of a greater Due Process violation.

Prejudice is shown because neither I, nor my attorney were there to defend against this evidence. I had never seen the evidence before trial, and not even during trial, and I could have proved I did not know the content and character of the evidence, but I was not present while the fact-finder was receiving this other evidence.

Further prejudice is shown becuase the Fact-Finder receiving other evidence during deliberating was the only way that I could have been found guilty on what I call the 'mystery count,' which is Cause 20949-B, Count II. There was no evidence shown in court for this Count during the State's case-in-chief. Regarding the small number of photos and videos shown during cross examination of the defendant, the State gave their own limiting instruction for that evidence, "it's all to impeach his testimony" (RR vol6, pgs 95-96). Since that evidence was limited to impeachment, it could not have been used to convict on.

No fairminded jurist would agree that the above set of events occuring did not significantly violate my Due Process rights. The Fact-Finder receiving other evidence while deliberating had a "sub-

stantial and injurious effect or influence in determing the [Fact-Finder's] verdict." Brecht v. Abrahamson, 113 S.Ct. 1710 (1993).

This was presented as GROUND SIX in my §2254 Petition. When denying my claim of trial court error, the Federal District Court said on page 24 of their Report and Recommendation that three CD-ROM's were admitted into evidence, and "The trial court judge was free to view all the documents admitted into evidence." What they did not take into account was that a CD-ROM is not the evidence, it does however contain the evidence, like a box. On those CD-ROM's were 1,326 digital media files, and the vast majority of those were not opened during trial or viewed by anyone, including the Defense. An unopened file is no different than an unopened envelope or packet of evidence.

If this had been a murder trial, and the prosecution admitted 3 boxes containing 1,326 packets of evidence, then only opened 100 of those packets during trial, and then let the fact finder open the other 1,226 packets of evidence while deliberating, no appeal court in this nation would uphold that conviction. This situation is no different. As of the writing of this Petition, I still have not seen this other evidence, and I have never gotten to confront it. This took away the most basic, the most fundamental, and the most important right of a defendant - the right to confront the evidence against them. This is a very severe violation of my Constitutional rights to Due Process. See U.S. v. McKinney, 429 F.2d 1019 (1970), "A jury should make its decision of guilt or innocence solely on the basis of evidence offered in open court with the judicial safeguards there afforded.

I feel this claim has national significance as more and more evidence is being submitted electronically, and there may not be much physical evidence. Any physical evidence submitted may just be a computer hard drive or a flash card to a camera, but those one or two pieces of physical evidence may contain thousands or tens of thousands of electronic pieces of evidence. Courts should take care that while juries are deliberating, they do not have access to evidence not shown during trial that is mixed in with evidence that was shown at trial. Otherwise, very severe due process violations will occur, just like in my case. I pray that this Court will grant relief for this issue.

Question 2.) What can be done to prevent prosecutors and courts from over-reaching the phrase 'lewd exhibition of the genitals'?

The phrase 'lewd exhibition of the genitals' destroyed my life. Yes, I took nude pictures of my daughter, and yes, I downloaded pictures of nude girls from the internet. However, none of those images were sexual or perverted in any way, and none of the images amounted to child pornography or sexual performance by a child. The only way I got convicted was that the prosecutor over-reached the phrase 'lewd exhibition of the genitals,' and the fact-finder (the trial judge) misunderstood the intention of that phrase. The prosecutor twisted the phrase to mean <u>any</u> exhibition of the genitals; however, that is not what is in the statutes. The statutes do not say and they do not mean 'any naked child will do.' The images in question only contain simple nudity, and are not sexually explicit in any way, and are thus not pornographic. This can be proven in two different ways:

a.) It's in the record. On pages 54-56 of volume 6 of the Reporter's Record, State's witness John Blais has a discussion with the Trial Judge, and he testifies that there is zero sexual activity depicted in the images and videos in evidence. In those images and videos, the girls may be nude or partially nude, but the files only depict innocent conduct. The girls are swimming or showering or sitting in a chair, but in normal, everyday ways, and they are doing absolutely nothing sexual or anything that suggests sexuality. Most importantly, at no point in time, in any picture or video, are the girls pointing out, flaunting, demonstrating, showing off, or drawing any attention at all to their breasts or their genital area. As

such, they could not have been conducting a lewd exhibition or a sexual performance, or participating in child pornography.

By refusing to issue a Certificate of Appealability, the 5th Circuit Court of Appeals is implicitly saying that it is all right to be convicted of possessing child pornography where the images in question are clearly not pornographic. This decision is in direct conflict with decisions of this Court and several Federal Courts. See Osborne v. Ohio, 110 S.Ct. 1691 (1990), (cannot be penalized for possessing innoculus photographs of naked children). See New York v. Ferber, 102 S.Ct. 3348 (1982), "nudity, without more, is protected expression," and "the reach of the [New York statute proscribing sexual performances of children] is directed at the hard core of child pornography." Ferber, pg 3359. See U.S. v. Williams, 128 S.Ct. 1830 (2008), in headnote 3, "Child pornography consists of sexually explicit visual portrayals that feature children." See U.S. v. Horn, 187 F.3d 781, 789, "[regarding the phrase 'lascivious exhibition of the genitals'] nudity alone does not fit this description." See U.S. v. Kemmerling, 285 F.3d 644, 645-646 (8th Cir. 2002), "We have held that more than mere nudity is required before an image can qualify as 'lascivious' within the meaning of the statute."

There is absolutely nothing "sexually explicit" or "hard core" about minor females sitting nude in an office chair in a normal way, standing naked in the woods, or merely taking a shower, as was depicted in the charged evidence.

b.) The NCMEC found no child pornography. During the Prosecutor's investigation, thousands of my computer files were compared to a child pornography database managed by the National Center for

Missing and Exploited Children. The NCMEC flagged not one file, not even one, as being child pornography. This is irrefutable proof that I had never downloaded any child pornography, not even by accident. This also proves that the Fact Finder was wrong about the images coming from the internet. The images of my daughter are no different in nature than the internet images, which the NCMEC did not flag as child pornography. It is easy to see that the Fact Finder was wrong about the images of my daughter as well.

I argued the insufficiency of the evidence at every level of my appeal. My claims were either not properly addressed, or just ignored by the appeal courts. My simple, powerful, and true argument - that the images and videos in question contain only simple nudity and nothing sexually explicit - has never been addressed, much less rebutted or controverted by any appeal court that has denied relief. Of the State Court of Appeals, the Texas Court of Criminal Appeals, the State Habeas Court, the Federal District Court, or the 5th Circuit Court of Appeals, none of those courts discussed the actual evidence or what makes any one image or video pornographic or not. Not one of those court discussed any of the exonerating case laws like those above (I provided many other case laws in my §2254 Memorandum of Law), and why those cases do or do not apply to my case. How can this be fair? How can this be justice? How can it be fair that I have to spend the rest of my life in prison because of a judge's flawed opinion of what is or is not child pornography?

I plead with this Court to please intervene, to please help. I firmly believe that because the images involved are clearly not pornographic, and were found not to be by the NCMEC, that my case has national significance and could be used to prevent further over-

reaching of the phrase 'lewd (or lascivious) exhibition of the genitals' by courts and prosecutors. This case could also be used to ensure that appeal courts do not uphold convictions based on such over-reaching. I pray this Court grant relief for this issue.

Question 3.) Can this Court do something to stop digital cameras from being treated as murder weapons?

Digital cameras are not shotguns. It is far too easy for someone to wind up with a very, very long prison sentence for just taking a few pictures. I did not intend to kill, wound, maim, or harm any person in any way. The pictures in my case aren't even pornographic, and I got more time than child rapists and even child murderers. My punishment was severly exaggerated, and I can show this Court why using two examples:

1.) When I was incarcerated at the Polunsky Unit in Livingston, Texas, I sat at the same table in the chow hall as a man that raped a young girl so bad (including using foreign objects) that she later died. He got basically the same sentence I did - he only has to serve 2½ years more than me to come up for parole. This was seven years ago, so I don't remember his first name or the exact case cite, but I will never forget his last name was Yost and the name of the case was Yost v. State (a Texas case).

2.) Something else I will probably never forget is reading a National Geographic about a woman somewhere in Africa. She saw her 7 year old daughter get eaten alive by a crocodile or an alligator. She told the magazine, "These things happen." Those were her exact words.

I gave those two examples to say this: Far, far worse things have happened to children than having their picture taken. In fact, the State of Texas forcibly separating my daughter from me was more traumatizing for her than anything (she cried for a long time because she couldn't see me). To punish me as harshly as I was punished, it is implied that my daughter walks around in a severly in-

jured, highly traumatized state. I know for a fact that is not the case. The prosecutor said so herself. When asked if my daughter was going to testify, the prosecutor had this to say about her well-being, "Yeah, I met with McKenzie week before last week and she's just fine." (RR vol 4, pg 6).

Well, I am not fine. My life is in absolute ashes. I do walk around in a traumatized state from what the State of Texas has done to me. Their prosecution of me started in September of 2009, and even after nine years after first being arrested, I still wake up crying. I have to take psych medicines just to get through the day. It is not fair, no matter what the lower courts have said regarding my punishment, it simply isn't fair.

See Graham v. Florida, 130 S.Ct. 2011, 2027 (2010), saying:

> "...defendants who do not kill, intend to kill, or forsee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." Other crimes "cannot be compared to murder in their 'severity and irrevocability. This is because life is over for the victim of the murderer, but for the victim of even a very serious nonhomicide crime, life ... is not over and normally is not beyond repair."

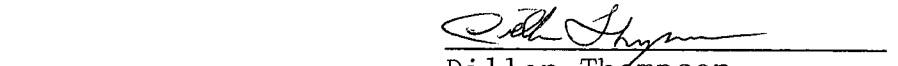
I feel this case has national significance as more and more people's lives are being utterly destroyed by simply using a digital camera. I pray that this Court will grant relief on this issue.

CONCLUSION

I respectfully pray that this Honorable Court issue a writ of certiorari to review the judgment of the U.S. Court of Appeals for 5th Circuit.

Executed on: September 17, 2018,

Respectfully submitted,



Dillon Thompson
Petitioner, pro se