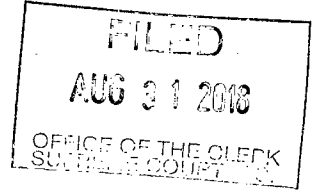


No. 18-7622

IN THE
SUPREME COURT OF THE UNITED STATES



KENDRICK BERNARD DEMUS

(Your Name) — PETITIONER

vs.

LORIE DAVIS, DIRECTOR, TDCJ-CID

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. DISTRICT COURT, EASTERN DISTRICT OF TEXAS, DALLAS DIVISION

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

KENDRICK BERNARD DEMUS

(Your Name)

TELFORD UNIT
3899 STATE HWY. 98

(Address)

NEW BOSTON, TX 75570

(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

GROUND ONE

When the State had Petitioner's codefendant testify against Petitioner and claim that the codefendant had received no promises of leniency in exchange for his testimony against Petitioner, yet when, prior to Petitioner's trial, the codefendant purportedly entered an "open plea" to Capital Murder, but the statutorily mandated sentence of automatic life without parole was not imposed, and instead, following his testimony against Petitioner, he was brought back to court, his guilty plea to Capital Murder was vacated, and he was allowed to enter a new plea to murder and sentenced to twenty-years, did the prosecutor engage in prosecutorial misconduct, in violation of Petitioner's right to Due Process of Law, by having the Petitioner's codefendant testify that he was not promised any leniency in exchange for his testimony against Petitioner?

VI & XIV amends. U.S. Const.

GROUND TWO

If the State's appellate courts incorporates the State's "accomplice witness rule" in its analysis of the legal sufficiency of the evidence under Jackson v. Virginia, 443 U.S. 307 (1979), is the federal habeas court, in its analysis of the "reasonableness" of the State appellate court's decision, also required to consider the State's accomplice-witness rule in regard to the federal legal sufficiency review?

VI & XIV amends. U.S. Const.

GROUND THREE

Was Petitioner denied Equal Protection when he was sentenced to automatic life without parole upon his conviction, as mandated under Texas law without exception, yet his codefendant did not receive the same automatic sentence of life without upon his guilty plea to Capital Murder?

V, VI & XIV amends. U.S. Const.

LIST OF PARTIES

- [☒] 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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OTHER

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

☒ 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,
☒ is unpublished.

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

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ 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

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was May 31, 2018.

☐ 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: June 22, 2018, and a copy of the order denying rehearing appears at Appendix B.

☐ 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

"No citizen shall be deprived of life, liberty or property without due process of law." V & XIV amends. U.S. Const.;

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a fair trial and to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI

All citizens are entitled to Equal Protection Under the Law.
U.S. Const. Amends. V & XIV

STATEMENT OF THE CASE

Petitioner Kendrick Bernard Demus (hereinafter "Demus") advertised a car for sale on Craig's List. The complainant Christian Marton (hereinafter "Marton") responded to the AD.

Marton, his girlfriend Monica Stafford, his younger sister Lisa, and his cousin Benny drove Stafford's red Tahoe to Dallas, TX to see Demus's car. After test driving the car, Marton and Demus could not come to an agreement. Demus was said to have become upset and walked away.

Four ~~of~~ days later, Marton called Stafford, told her Demus had lowered the price of the car. Marton and Stafford drove back to Dallas with a trailer attached to Stafford's Tahoe to haul the car. They planned to meet Demus at a Whataburger fast food restaurant where the first meeting occurred, however Demus called to arrange a meet at another location. When Marton and Stafford arrived at the location, they did not see Demus or the car, so they called Demus to tell him where they were located. Demus said he would meet them there and for them to wait for him to arrive.

While waiting for Demus to arrive, Marton stood outside the Tahoe talking to his cousin Benny on a cell phone. Stafford remained inside the Tahoe texting. On the window of the Tahoe was a written notice that the rims on the Tahoe were for sale. At that time, Demus's codefendant George Carter (hereinafter "Carter") approached Marton and asked about the rims. Then, Stafford heard Carter say "give me your money and get off of the phone." Stafford saw Carter point a gun at Marton. She then saw Marton reach for a gun he had concealed on his person, at which time she saw Carter shoot Marton. She heard Marton scream, and watched Carter turn and run away. Marton died from the gunshot wound. (Volume 3 of Reporter's Record of Trial, at pages 9-58)(hereinafter "3 RR 9-58")

Following an investigation, Demus and Carter were arrested and both were charged with Capital Murder in Marton's death. (Id.).

REASONS FOR GRANTING THE PETITION

GROUND ONE

When the State had Carter testify against Demus and claim that Carter had received no promises of leniency in exchange for his testimony against Demus, yet when prior to Demus's trial Carter purportedly entered an "open plea" to Capital Murder, but the statutorily mandated sentence of automatic life without parole was not imposed, and instead, following his testimony against Demus, Carter was brought back to court, his guilty plea to Capital Murder was vacated, and Carter was allowed to enter a new plea to murder and sentenced to twenty-years, did the prosecutor engage in prosecutorial misconduct, in violation of Demus's right to Due Process of Law, by having Carter testify at Demus's trial that he was not promised any leniency in exchange for his testimony against Demus?

Review should be granted because the United States Court of Appeals for the Fifth Circuit has decided an important federal question in a way that has so far departed from the accepted and usual course of judicial proceedings, and/or sanctioned such a departure by the lower courts, as to call for an exercise of this Court's supervisory power.

In Berger v. United States, 295 U.S. 78, 88 55 S.Ct. 629 (1935), the Supreme Court made clear that while prosecutors "may strike hard blows, [they] are not at liberty to strike foul ones." In Banks v. Dretke, 540 U.S. 668, 694, 124 S.Ct. 1256, 1274 (2004), the Supreme Court held that "Courts, litigants, and juries properly anticipate that obligations to refrain from improper methods to secure a conviction plainly resting upon the prosecuting attorney will be faithfully observed."

According to the State habeas court's findings of fact and conclusions of law, a sentence of life without parole "is mandated by statute for capital murder convictions in which the State is not seeking the death penalty. (State habeas Findings at paragraph 37); citing Texas Code of Criminal Procedure, Annotated Article 37.071, § 1 (West Supp. 2014). A finding which is entirely accurate.

Yet, none of the Court's below required the State to explain why, if no promise of leniency or deals had been made with Carter in exchange for his testimony against Demus, Carter did not receive an

automatic sentence of life without parole. None of the courts below required the State to explain how and why, following Demus's conviction, Carter was brought back into court, his guilty plea to Capital Murder was vacated, and he was allowed to plead to Murder and received a twenty-year sentence if in fact he had no deal with the State.

What occurred in Carter's case is so outside of normal and usual trial proceedings and the dictates of State and Federal judicial proceedings that it is apparent that Carter's initial plea hearing was a staged event specifically designed to deceive Demus's jury into believing that Carter had no incentive to testify falsely against Demus because, as the prosecutor told Demus's jury, Carter was facing the same Capital Murder sentence as Demus. (3 RR 103). What occurred following Demus's conviction demonstrate's that the prosecutor suborned perjury when he had Carter testify that no deals or promises had been made with the State in exchange for his testimony against Demus. And the fact that no court below required the State to explain the highly unusual course of events that followed Carter's testimony deprived Demus a fair and adequate means to vindicate the violation of his rights under the Due Process Clause of the U.S. Constitution.

Demus respectfully request that certiorari be granted.

GROUND TWO

If the State's appellate courts incorporates the State's "accomplice witness rule" in its analysis of the legal sufficiency of the evidence under *Jackson v. Virginia, 443 U.S. 307 (1979), is the federal habeas court, in its analysis of the "reasonableness" of the State's accomplice-witness rule application to the legal sufficiency issue, also required to consider the rule in its review?

Review should be granted because the United States Court of Appeals has decided this issue in a manner that is in conflict with this Court's decision in Jackson, supra and in conflict with State appellate law. See McDonald v. State, No. 11-14-00010-CR (Tex.App. Eleventh Court of Appeals, Jan. 21, 2016)(When the verdict could have been based upon the testimony of an accomplice, the sufficiency review must incorporate the accomplice-witness rule stated in Art. 38.14. There must be corroborating evidence.)

Demus maintained that the evidence was legally insufficient to convict him, because there was insufficient evidence independent of the testimony of Carter tending to connect him to the murder. Demus argued during federal habeas proceedings that the federal habeas court's review of the State habeas courts' legal sufficiency decision, and the reasonableness thereof, necessarily required the federal court to, too, incorporate the accomplice-witness rule in the federal court's analysis.

Citing Shy v. Director, No. 4:11-CV-378, 2014 WL 4683756 at 12-13 (E.D. Tex. Sept. 19, 2014), the District Court held that "accomplice-witness rule [is] not considered in federal habeas review of the sufficiency of evidence, because it is a state rule and not a constitutional requirement." (Federal Magistrate's Findings and Recommendations, at 14-15)(Adopted by District Court).

In In re Winship, 397 U.S. 358, 364 (1970), the Supreme Court held that the government must prove "every fact necessary to constitute the crime" beyond a reasonable doubt.

Under Texas law, a conviction cannot be based upon the testimony of an accomplice-witness unless there is independent evidence corroborating such testimony which tends to connect the defendant to the offense. (See Article 38.14, Texas Code of Crim. Proc.)

Demus's argument is that the federal habeas court is not able to review the "reasonableness" of a State habeas or appellate court's legal sufficiency review unless the federal court also review the claim under the lens of the accomplice-witness rule.

This Court's review is needed in order to clarify this very important issue of federal law of whether a state's incorporation of its statute into a federal constitutional review requires a federal court to apply that rule in its reasonableness review.

Demus respectfully request that certiorari be granted.

GROUND THREE

Was Petitioner denied Equal Protection when he was sentenced to automatic life without parole upon his conviction, as mandated under Texas law without exception, yet his codefendant did not receive the same automatic sentence of life without upon his guilty plea to Capital Murder?

Review should be granted because Texas applied its sentencing law in an arbitrary manner against Demus which rises to a level of a violation of Demus's right to Equal Protection under the law. In doing so, the State courts' sentencing of Demus to life without parole is contrary to this Court's decision in Lockyer v. Andrade, 538 U.S. 63,72 (2003) and Edmund V. Florida, 458 U.S. 782 (1982).

Demus was not the shooter, Carter was. Demus was not even present when Carter shot and M killed Marton. The record shows that Carter testified that Demus was surprised when he found out Carter had shot and killed Marton. (3 RR 98-101). Yet, Demus not only received an automatic sentence of life without parole, but his attempt to receive the benefit of a plea offer from the State was short-circuited by the trial judge in a vindictive manner. (See federal Magistrate's Findings and Recommendations, at P. 7-8).

Review should also be granted because there exists a split amongst the federal circuits regarding the issue of the disproportionality of Demus's and Carter's sentences when Carter, the actual killer, received an opportunity to have his Capital Murder conviction reduced to murder and receive only a twenty-year sentence. See U.S. v. Mazzaferro, 865 F.2d 450,460 (1st Cir. 1989)(disparity between 20-year sentence imposed on defendant who stood trial and ten-year sentence of codefendant who pleaded guilty created appearance of retaliation against defendant for standing trial because codefendant played greater role in crime); See also, V.I. v. Walker, 261 F.3d 370,376 (3d Cir. 2001)(disparity between 23-sentence for defendant who pleaded not guilty and 2-year sentence for codefendant who pleaded guilty raised inference that sentencing judge placed undue consideration on defendant's choice to exercise his right to go to trial.)

Demus was sentenced by the same trial judge who allowed Carter to vacate his Capital Murder conviction and reduce it to murder and a twenty-year sentence, despite the mandatory nature of the State's Capital Murder sentencing statute. By whatever authority the trial judge used to override Carter's automatic life without sentence, the judge could have, and should have, provided the same option to allow Demus to seek a lesser sentence, especially when Demus was not even present at the murder and did not aid, solicit, or encourage Carter to shoot and kill Marton.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Arthur Perez

Date: 8-31-18