No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

BRADLEY J. BARTON — PETITIONER
(Your Name)

vs.

LORIE DAVIS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Bradley Barton
(Your Name)

899 FM 632
(Address)

Kenedy, TX 78119
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

(1.) At what point does a state's post-conviction remedy become so inadequate as to render that process "ineffective" as contemplated by 28 U.S.C. § 2254 (b)(1)(A)(ii) ?

(2.) Whether the circumstances surrounding Petitioner's state habeas process rendered it ineffective ?

(3.) Whether the Court of Appeals erred in finding that Petitioner did not make the necessary showing for a Certificate of Appealability?

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:

BRADLEY BARTON, TDCJ-CID #1680744,

Petitioner,

v.

LORIE DAVIS, Director of Texas Department of Criminal Justice — Correctional Institutions Division.,

Respondent.

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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

[√] 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[√] is unpublished.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 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[√] is unpublished.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[ ] is unpublished.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[ ] is unpublished.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 15, 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: _____, 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

28 U.S.C. § 2254 (b)(1)(ii)

(b)(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 unless it appears that —

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

STATEMENT OF THE CASE

The underlying state habeas application was filed in March of 2012. In it, Petitioner alleged, *inter alia*, that the State Knowingly used the perjured testimony of Nahji Jackson and concealed a deal for her testimony. In May of 2012, the State conceded that there were "controverted facts material to the legality" of Petitioner's incarceration and that factual findings should be entered to resolve the claims. The trial court agreed and pursuant to Article 11.07, sec. 3(d) of the Tex. Code Crim. Proc., entered an "Order Designating" specific issues (ODI) of the application to be resolved. Such an order effectively holds a habeas application in abeyance until the factual issues are resolved.

At this point the procedural tangles which have marked this litigation from its inception took a complicated and unusual turn. In the application Petitioner had also alleged structural error stemming from alleged bias of the trial court who ultimately executed the deal with Jackson. Pursuant to the Texas Court of Criminal Appeals' (TCCA) ruling in *Ex parte Sinegar*, 324 S.W. 3d 578, 579 (Tex. Crim. App. 2010), Petitioner moved for the trial court's recusal from the habeas case. After the court failed to act on the recusal motion, despite the statutory and case law language mandating such, Petitioner moved for mandamus relief in the TCCA. The TCCA then admonished the trial court to comply with its recusal procedural duty. See APPENDIX F

Because the court did not fully comply with the TCCA's order, Petitioner again moved for mandamus relief. That was denied. From that point on, Petitioner's state case stood stagnant, even after he filed motions for appointment of counsel and live hearings; to move the case forward to the factfindings the ODI intimated were imminent.

Frustrated with not being able to get his state remedy's case moving, Petitioner filed a federal petition for writ of habeas corpus. The State's Attorney General's Office ("AGO") filed a response saying that, although Petitioner "vigorously pursued his rights," in state court, the delay, nevertheless, wasn't "completely" the State's fault since Petitioner filed motions for recusal, and thus it was partly his fault his state process was delayed.

Petitioner countered that there was no way he could allow the habeas claims to be considered, one of which alleged bias, by the same judge his habeas claim was against. And thus, it was incumbent upon him to move for recusal. And the other motions, far from contributing to the delay, moved to have the case proceed to factfinding.

The district court sided with the AGO, found Petitioner partly to blame for the delay, and dismissed the case.

Because the AGO and the district court indicated that the filings of motions period by Petitioner made him responsible for delay, he waited until the total amount of uninterrupted time his state case lay stagnant was 12 months, in accordance with Circuit precedent finding such a time period inexcusable delay, and again filed in federal court (under the instant case), seeking excusal from the exhaustion doctrine under 28 U.S.C. § 2254.

This time, he accompanied his federal petition with a "Motion To Limit Preliminary Litigation To Issue of Exhaustion In Light of Petitioner's Frustrated Attempts To Exhaust His State Court Remedies," APPENDIX G ("Motion to Limit"), which fully explained the previous federal petition, the premise for that dismissal, Petitioner's frustrated attempts to exhaust his state remedies, and how, because of those good-faith attempts, his state process was ineffective to protect his rights under 28 U.S.C. § 2254(b)(1)(A)(ii) and therefore the

court should rule so and allow de novo review. Id. at 1-3.

The District Court then entered an "Order For An Answer." APPENDIX H. In it, the court stated that Petitioner "has filed a motion asserting that he has made a good faith effort to exhaust state court remedies but that the state has unreasonably delayed the process []. He seeks a finding by the Court as to whether state courts have effectively denied him a viable opportunity to exhaust his claims. The [c]ourt agrees that three years is too long for a state habeas application to be pending in the state courts without being ruled upon unless there is some justification for the delay." Id. at 3.

Accordingly, the court ordered the AGO to "file a report... as to the progress and status of petitioner's... state application.... an explanation for delays or difficulties in making findings and conclusions in the ...state application .... an estimate as to when the application shall be submitted to the [TCCA] and when a ruling may be entered by [it]. The report shall also state whether it is feasible to exhaust remedies in the state courts [] or if further efforts to seek exhaustion would be futile." Id. at 4.

What happened next is reflected on Petitioner's "Motion to Stay State Court Proceedings." APPENDIX J, filed shortly thereafter.

As that motion reflects, since the entering of the ODI June 4, 2012 until the District Court's Order for an Answer March 12, 2015, the State had filed nothing in Petitioners case. In the Motion to Stay, Petitioner stated:

> (After the Order for Answer), the DA, though it has not filed one pleading in three years to move Petitioner's case forward or conduct any type of fact finding proceeding, despite Petitioner's repeated request through out that time to do so, on April 15, 2015, filed 3 diffrent "State's Motion Requesting Order for Filing an Affidavit" (which in light of

the application's allegations, its attached evidence, and the motions Petitioner has filed in order to secure the evidence and conduct the hearing, is a grossly inadequate method for ascertaining the allegations) in his state court relating to a ground in his habeas application.

This, Petitioner points out, was ostensibly done after [the] [c]ourt's [order for an answer]. Petitioner also points out that he has filed, in the same habeas court [numerous fact-finding motions, etc.]. All motions have been ignored for the last three years, and the recusal motions were insidiously underminded, which led to an order by the TCCA.

In short, Petitioner can... show that *in addition* to the unjustifiable delay that has occured in his state habeas case, "circumstances" throughout his lengthy wait have included constitutional violations in the process itself, which further shows that the state process, in his case, is ineffective to protect his rights. Petitioner also asserts that the DA's motion filed April 15th, all of a sudden, ostensibly after th[e] [c]ourt's [order for answer], after three years of no motions filed, is an attempt by the DA to show a ripple of movement in the state case, in order to invidiously dodge potential jurisdiction of [the] [court].

APPENDIX J, at 2.

The AGO then filed its report, APPENDIX I. In it, in response to the District Court's order of "the progress and status of petitioner's pending state application," the AGO cited a filing from the State *after* and as a *result of* the Order for an answer. Then, in response to the District Court's requests of "an explanation for delays and difficulties in making

findings and conclusions in the pending state applications," the AGO stated that "[b]ased on the records, it appears that the case has been delayed by numerous filings by Barton. He has filed three motions to recuse... six writs of mandamus... and one petition for certorari. These filings have spanned from June of 2012 to July of 2014. Although the [AGO] cannot explain delay from July of 2014 to April of 2015, this amount of unexplained delay is not inordinate. APPENDIX I, at 2.

Petitioner countered by again rehashing his Motion to Limit, that was filed simultaneously with the petition for habeas relief, that lays out the motions filing. Also, he pointed out that the motions made to the trial court, except when the TCCA ordered it to answer, went ignored and unruled on. In that light, Petitioner asserted, it's absurd to say those motions caused delay. Also, the six mandamus actions (one of which included a ruling to the trial court) were to the TCCA and not the habeas court, which again does not cause delay in the habeas court. The same rings true with the certorari petition to this court.

Ultimately, the District Court adopted the AGO's reasoning and concluded that Petitioner did "not demonstrate that the delay in this case is wholly and completely the fault of the State or that the delay in this case has violated his due process rights." APPENDIX E, at 9.

The court also concluded that Petitioner had "not demonstrate[d] that his state habeas application has languished without processing or development." Id. In support of such conclusion, the court cited activity and "development" that occured ~~after~~ the court had issued the Order for an Answer Id. at 9-10.

In moving for reconsideration, Petitioner argued 28 U.S.C. § 2254(b)(1)(A)(ii) would be meaningless if a state could just wait until it receives, as it did here,

some type of warning that a federal court was about to take jurisdiction of a habeas initial review case because the State's process was ineffective, from that rush a process through, then cite the activity from that rushing, as the State did here, as "processing and development" of habeas claims.

Also, as Petitioner pointed out in his Motion to Stay, the rushing through of the process, both underneath and at its face, appeared fundamentally unfair. As the state application dealt with serious issues that needed to be resolved through meaningful adversarial proceedings. And instead, the state filed its Motions requesting the habeas court (who was not the trial court) to order affidavits, with specific questions, from a select few individuals the State chose, while Petitioner filed similar motions that, like his others, went ignored. And the habeas court wholly adopted the State's drafted findings.

Petitioner appealed the court's ruling to the Fifth Circuit who eventually dismissed it as moot, citing the disposition (made after the State rushed through because of the Order for Answer) in the State. See APPENDIX D

Back in the District Court, now with the restrictions imposed by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Petitioner filed a "Motion for Appointment of Counsel, Authorization of Discovery, and a Evidentiary Hearing." APPENDIX K. In it, Petitioner asserted "[i]n light of the fundamentally unfair, inadequate, and meaningless paper 'hearing' Petitioner received in his state habeas process, and... intervening circumstances" appointment of counsel, discovery, and an evidentiary hearing was needed.

Specifically, Petitioner layed out Texas's habeas remedy's law. Afterwards, he asserted "[t]he procedure prescribed by Texas law seems reasonable. However, its application to Petitioner's state habeas application was not. The state trial court purported to have a hearing on Petitioner's state habeas application and

purported to make findings of fact, but, as explained below, did neither in a meaningful way." Id. at 2.

Before going into the specifics of that, however, an important part of this cases's history must be brought to the forefront.

In the District Court's Order for an Answer, in addition to addressing the exhaustion issue, it also ordered the AGO to answer the merits of Petitioner's claims.

In that context, Petitioner's state habeas application's allegation that Jackson's perjured testimony was knowingly used and a deal with her was hidden was supplemented by an affidavit from Jackson herself, as well as another inmate in the Harris County Jail Jackson had a conversation with about the deal, as well as a "Criminal History" sheet showing the status of Jackson's case at Petitioner's trial.

As to that case, Jackson, four months before trial, had been arrested in Stillwater, Minnesota on an fugitive warrant out of Harris County, Texas. Jackson's warrant stemmed from a felony probation violation.

Upon her arrival in the county jail Jackson was interviewed by the detective on Petitioner's case. At the urging of the detective, Jackson gave an incriminating statement against Petitioner alleging he told her, *inter alia*, of his involvement in the robbery/shooting he was scheduled to go to trial on. (Jackson was well-known to be Petitioner's girlfriend and the mother of his child). Around this time, the "Motion to Revoke" Jackson's probation that she was being held for changed to a "Motion to Adjudicate."

Jackson was held without bail. She ended up testifying for the State and Petitioner was convicted. The day after the conviction Jackson was released. Not only was she released, but the State (and trial judge) dropped all charges against Jackson in

exchange for a promise by Jackson to the trial court that Jackson would stay away from Petitioner and not allow her son to know his father.

Shortly after her release, Jackson apparently harbored anger towards the State because apart of the deal with Jackson was that her charges/convictions wouldn't show on her record. But they did. Jackson told her family, Petitioner's family, and eventually him of the deal with the State. Jackson also provided a brief affidavit of this, which Petitioner attached to the state application.

Also, though, in response to the AGO's answer to the merits ordered by the District Court, Petitioner provided affidavits from Jackson's sister, Jackson's mother, Petitioner's mother, and a second more detailed affidavit from Jackson herself, laying out the perjury and deal in exchange for them.

Now in the Motion for counsel, discovery, and a hearing, in explaining how the state process that was rushed was both unfair and meaningless, Petitioner showed:

> On April 15, 2015, three years and twenty-seven days after Petitioner filed his state habeas application, and only because of the Court's (Doc.# 4) order, the State of Texas (the State), through the office of the Harris County District Attorney's Office, filed multiple "Motion[s] Requesting Order for Filing Affidavit," in response to, inter alia, Petitioner's allegations that his trial prosecutor, Marcey McCorvey, knowingly utilized perjured testimony of Nahji Jackson and concealed a deal with Jackson.... The State alleged that there was a need for the expansion of the record, but that the only expansion needed was an affidavit from Jackson's former counsel, E. Ross Craft, addressing Petitioner's allegations concerning Jackson's perjured testimony. The State concluded its motion requesting the state trial court order Craft to provide such an affidavit.

The very next day, after Petitioner had been making similar, and other fact finding, motions for years (which all went ignored), the state trial court signed an order proposed and completely drafted by the State directing Craft, in essence, file responses to questions basically asking whether Craft was ever made aware of Jackson being threatened and asked to provide false testimony. The affidavit Craft filed May 19, 2015 was prepared in consultation with the prosecutor. The affidavit answers the above-cited orders inquiry with "no" followed by one or two sentences, and those sentences, besides a general denial of Jackson ever having related to Craft any threats or promises made by the State, do not go into detail of Craft's interactions with Jackson.

The State then strategically did a "blitz" on August 3, 2015. On that date, it filed affidavits from Donna Logan, McCorvey, Detective Clopton (all of whom are the very representatives of the State Jackson alleges coerced and threatened her), and Steven Januhowski (who's affidavit was, in large part, based on a "jailhouse informant," *Maxwell v. Roe*, 628 F.3d 486, 498 (9th Cir. 2010), Keith Washington), who was apparently McCorvey's investigator at the time of Petitioner's trial.

These affidavits basically deny Jackson's allegations of coercion and assert that her affidavit was fradulent; and actually coerced by Petitioner. Along with the affidavits, the state filed a "Proposed Findings of Fact and Conclusions of Law and Order," which the state habeas court readily adopted 9 business days later, without any live hearing to ascertain the truth of the conflicting accounts of Jackson's deal; despite the obvious reasons it should have done so. Especially since the habeas and trial judges were two diffrent judges.

On October 9, 2015, while the application was pending in the Court of Criminal Appeals, the State sent Petitioner a letter, which is attached hereto as EXHIBIT #1, regarding Clopton:

> Harris County Sheriff's Department Investigator C. Clopton has acknowledged to Harris County District Attorney Investigators that during the ongoing criminal investigation in the case styled The State of Texas v. Shannon Miles,... Investigator Clopton engaged in consenual sexual conduct with a witness in that same investigation. The office is notifying you of this information so that you may take any action deemed necessary in relation to your criminal case.

On November 25, 2015, a judge of the TCCA signed a one-sentence order advising that the "ACTION TAKEN" concerning the disposition of Petitioner's 11.07 habeas application was that it was "DENIED WITHOUT WRITTEN ORDER ON FINDINGS OF TRIAL COURT WITHOUT HEARING."

"It might be charitable to describe the steps leading to the denial of Petitioner's state application as a series of charades. The conduct of the state [habeas] court in complying with the State's suggestion that the only expansion of the record needed was [affidavits from its officers and having a paper hearing on the affidavits] was an absurd pretense that Petitioner was being given a hearing on his application. No provision having been made for Petitioner to have a role in the 'hearing,' the degree of fairness and objectivity of the proceeding [although having done so long before, really] deteriorated from there." *citation omitted.*

Petitioner asserts that, because he did not receive a full and fair hearing in state court, this Court should find the state court's determination of the facts to be unreasonable; and appoint counsel, authorize discovery, and if

necessary, grant him an evidentiary hearing.

APPENDIX K, at 2-4.

Petitioner then showed, with supporting authorities, exactly how he was not given a full and fair hearing in state court; how the allegations of his petition, if proven true, would entitle him to relief, and even with limited review of just the record before the state court he is still entitled to the hearing sought. Id. at 5-10.

Despite this, the District Court denied the motion and the habeas petition, citing the state court's findings (completely drafted by the State). And of significant importance to those findings is the first affidavit of Jackson, and the "jailhouse informant" Keith Washington.

As for Jackson's first affidavit, the State (and thus state court) dismissed it as "fradulent" and coerced by Petitioner. However, neither the State nor District Court gave any fair look at the fact that in 2014 and 2015 Jackson's OWN FAMILY corroborated the perjured testimony claim; that the documents (offered by the State) lended credibility to the claim; neither the State nor District Court gave any mention to the inmate who discussed the deal with Jackson; Janowski's cited telephone conversations of Jackson (which is objective evidence) shows clearly her anger towards the State for not holding up its part of the deal for the testimony; and finally the second more detailed affidavit from Jackson. All of which is independent of the 2012 affidavit the State claimed to be fradulent. And in discounting Jackson's family's affidavits, the District Court mischaracterized them as "cumulative" and Jackson's conflicting trial testimony as "consistent" when, in fact, that was not the case.

OF great importance too is the account of Washington. He claimed to

have had several conversations with Petitioner and came to the conclusion that Petitioner "orchestrated the murder" (the murder occured from a robbery gone bad in which Petitioner was found guilty, as a party, having been the getaway driver),

Washington wrote the DA's office explicitly seeking gain for his information he claimed to have. Once a DA investigator — Janvoski — went to visit Washington, he gave a fanatical account of how Petitioner supposely told him of plans to harm the prosecutor, and intimidate witnesses on his case, as well as flood all type of contraband in TDCJ.

This account of Washington was used to discredit ANY witness recantation and was not subject to cross-examination. In response, Petitioner provided documentary evidence from Washington himself that severely discredited his account of Petitioner's supposed exchanges. Further, Petitioner also alleged, and supported with documentary evidence, that Washington posed as a "Writ writer" when Petitioner was first sent to prison, promising to help him with any remedies he may have. As of this, Petitioner sent him the paperwork from his case, and off of that, Washington concocted the story he did. APPENDIX L

Petitioner appealed the District Court's denial to the Fifth Circuit, bringing forth all the issues outlined *supra*. On May 15, 2018, the Fifth Circuit denied Petitioner's motion for a Certificate of Appealability.

In the denial, that court wrote/acknowledged:

> In his filings to this court, Barton asserts that the district court erred in deferring to the state habeas court's factual findings because the state habeas proceeding was ineffective to protect his rights and because he did not receive a full and fair hearing in the state court;

that the state habeas court's findings and decision were unreasonable; and that the district court abused its discretion in denying his motions for discovery and an evidentiary hearing. His COA motion and the above-noted supplements to his COA motion also address the merits of his claims that the prosecution made a deal with Nahji Jackson to falsely testify at his trial....

To obtain a COA, Barton must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2); see *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).... Barton has not made the showing required to obtain a COA. See id. Accordingly, his motion for a COA is DENIED.

APPENDIX A, at 1-2.

Petitioner now moves for a Writ of Certorari in this Court.

REASONS FOR GRANTING THE PETITION

Since the enactment of the AEDPA, the Court has not issued any rulings concerning a crucial element of that statute: the exhaustion exception codified in 28 U.S.C. § 2254 (b)(1)(A)(ii). The instant case shows why the Court should now take up the issue and render a ruling.

In the context of exhaustion of state remedies before the seeking of a federal writ of habeas corpus by a state prisoner, the Court first addressed this in *Ex parte Royall*, 117 U.S. 241 (1886). Cases thereafter provided a framework for the exhaustion doctrine. However, since the passage of AEDPA, the Court has not issued a ruling centered around or focused on the exhaustion doctrine's codified exception in light of AEDPA's fundamental reshaping of habeas corpus jurisprudence.

Petitioner's case illustrates compelling reasons why this Court should now take up the issue of the exhaustion doctrine and its statutory exception codified in 28 U.S.C. § 2254 (b)(1)(A)(ii)

The exhaustion requirement was the response to an inevitable tension between state and federal interests created by the historical importance of the Great Writ in Anglo-American law and the system of dual sovereignty at the heart of the American Constitution. The federal interest was in a sure and speedy method of remedying unconstitutional incarceration — for this was the very purpose of the Great Writ — and since 1867, the federal courts had been empowered to exercise that remedy with respect to state convictions. The state interest, on the other hand, was in an orderly functioning of its own judicial processes without needless interference by the federal government:

> As it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity

> for the state court to correct a constitutional violation, the federal courts sought a means to avoid such collisions. Solution was found in the doctrine of comity between courts, a doctrine which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter. *Darr v. Burford*, 339 U.S. 200, 204 (1950).

The comity spoken of in *Darr v. Burford* necessarily involves a balancing of both state and federal interests, of orderly state judicial administration and speedy vindication of constitutional rights. See *Younger v. Harris*, 401 U.S. 37, 44 (1971). The exhaustion doctrine is a compromise which reflects the interests and needs of both federal and state systems. The principle of comity means that the federal courts are not usually able to grant an immediate remedy given the requirement of exhaustion. On the other hand, the state judicial process can hear a petitioners' constitutional claims immediately and indeed has a duty to pass on them every bit as great as the federal courts have.

In sum, the notion of comity which underlies the exhaustion doctrine requires that the state courts be given the first opportunity to pass upon the petitioner's federal claims. *Picard v. Connor*, 404 U.S. 270, 275 (1971). The doctrine must be understood not as a capitulation of federal power to state interests; rather, comity involves a delicate balance and compromise of both state and federal concerns. See, e.g., *Brown v. Allen*, 344 U.S. 443 (1953); *Allen v. McCurry*, 449 U.S. 90 (1980). For as much as the unchanneled exercise of habeas corpus by the federal courts would disrupt the integrity of the state criminal process, so too would an unthinking subservience to state sovereignty render the time-honored Writ of Liberty sterile and nugatory. Comity requires sensitive accomodation, and not

simply slavish adherence, to the interests of the states.

The doctrine of exhaustion, an embodiment of the principle of comity, is the result of a delicate balancing of federal and state interests. Underlying the compromise is the assumption that although immediate access to a federal forum for speedy resolution of federal claims is not possible, the state court system will be able to address the petitioner's claims as he works his way through that system. Of course, this assumption itself rests upon a still deeper one; namely, the belief that state courts are, in good faith, equally willing and able to protect federal constitutional rights as the federal courts. Indeed, *Ex parte Royall* made that assumption explicitly when it stated that the circumstances in the cases before it did not

> suggest any reason why the State court of original jurisdiction may not, without interference upon the part of the courts of the United States, pass upon the question which is raised as to the constitutionality of the statutes under which the appellant is indicted. The Circuit Court was not at liberty, under the circumstances disclosed, to presume that the decision of the state court would be otherwise than is required by the fundamental law of the land, or that it would disregard the settled principles of constitutional law announced by this court, upon which is clearly conferred the power to decide ultimately and finally all cases arising under the Constitution and laws of the United States. 117 U.S. at 252.

Thus at the very core of the exhaustion doctrine is the requirement that state procedures be adequate and effective, for it is only because these procedures are adequate to vindicate federal constitutional rights that the forbearance of the federal courts from swift consideration of habeas corpus claims is justified.

If the state procedures do not provide a bona fide forum for a petitioner's constitutional claims or merely delay and hinder ultimate resolution, the foundations upon which exhaustion doctrine rests are dissolved. The balancing of interests which is always inherent in the doctrine of comity then tips in favor of immediate consideration of a petitioner's claims through federal habeas proceedings.

The present codification of the exhaustion requirement, 28 U.S.C. §2254(b), speaks directly to this problem. It states that exhaustion of state remedies is required unless "there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." *See Rose v. Lundy*, 455 U.S. 509 (1982) (exhaustion doctrine does not bar relief where state remedies are inadequate).

In *Ex parte Hawk*, 321 U.S. 114, 117 (1944) (decided at a time when re-litigation of federal claims was not permitted in habeas proceedings after a full and fair hearing in the state courts) had held that "where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the state affords no remedy,... or because in the *particular case the remedy afforded by state law proves in practice* unavailable or *seriously inadequate*,... a federal court should entertain (the prisoner's) petition for habeas corpus, else he would be remediless." 321 U.S. at 118 (emphasis added).

It is because state procedures may not always be adequate or effective that courts have treated the exhaustion requirement with flexibility. In some cases where the state procedures are found wanting the courts will speak to the claims as not requiring exhaustion; in others the claims are considered "technically exhausted." The courts have also held that where the state processes cause undue delays to the hearing of petitioners' claims in special circumstances, a petitioner's claims may be treated as technically exhausted. Once

again, this exception makes sense in the context of the underlying compromise between swift vindication of rights which is the purpose of the Great Writ and accomodation of the somewhat slower but normal judicial processes of the state courts. Where the state processes are unduly and unreasonably delayed through no fault of the petitioner, the terms of the compromise must be re-evaluated.

Which brings us to Petitioner's case. No fair or logical readings of the facts and evidence can hold Petitioner at fault for any delay in the long wait he had in state court. A wait that prejudiced his claims. The process was indubitably unduly and unreasonably delayed. And to say that unanswered motions seeking to proceed to factfindings of his claims, mandamus petitions to a whole seperate court to get the habeas court to comply with its duties, and a certorari petition to this court somehow caused unspecified delay in Petitioner's state habeas court was absurd.

But, absent guidance from the Court, and in the spirit of AEDPA, that type of absurd disregard for the plain language of 28 U.S.C. §2254(b)(1)(A)(ii) will continue. Such absurdity undermines the Great Writ and the principles it has been built and based off of.

As the Court held in *Bartone v. United States*, 375 U.S. 52, 54 (1963), "exhaustion ought not be required when the state procedural snarls or obstacles preclude an effective state remedy." as it did in Petitioner's case. For 28 U.S.C. § 2254 itself has a exception. However, because the Court has issued no rulings squarely dealing with that exception, unjust rulings like the one in this case have been able to persist. And absent guidance from the Court, they will continue. The instant case offers the Court just the right amount of facts to issue a ruling on the issue so that

courts may be guided in the future on this very important proviso not yet really addressed under 28 U.S.C. § 2254 which otherwise has had a string of rulings from the Court.

For the same reason Petitioner did not receive fair consideration of his good-faith attempts at exhaustion, he also did not receive fair consideration of his underlying claims. Therefore, the Court should take up this important issue and render a just ruling.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Bradley Barton

BRADLEY J. BARTON

Date: August 8, 2017