

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Richard Boore — PETITIONER
(Your Name)

vs

State of Mississippi — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Supreme Court of the state of Mississippi
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Richard Boore
(Your Name)
Southern Mississippi Correctional Institution
P.O. Box 1419
(Address)

Leakesville, Ms. 39451

(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. Whether Permitting a three Judge Panel of the Mississippi Supreme Court to Grant or deny Prisoner's Application for Leave to Proceed in the Trial Court on Post-Conviction Collateral Relief Passes muster under the fundamental and substantive Procedural Due Process Clause of the Fourteenth Amendment to the United States Constitution, when the Court has Nine Justices?
2. Whether the Mississippi Supreme Court's Denial of Petitioner's Application for Leave to Proceed on Post-Conviction Relief holding that Notwithstanding the Procedural Bars, the claims are without merit, was contrary to or an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States?

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:

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
<u>Arizona v. Fulminante</u> , 111 S.Ct. 1246 (1991) - - - - -	19
<u>Colburn v. State</u> , 990 So.2d. 206 (Miss. Ct. App., 2008) - - - - -	19
<u>Hewes v. Langston</u> , 853 So.2d. 1337 (2003) - - - - -	9
<u>Lett v. State</u> , 902 So.2d. 630 (Miss. Ct. App., 2005) - - - - -	19-20
<u>Pinkney v. State</u> , 192 So.3d. 337 (2015) - - - - -	14
<u>Quick v. State</u> , 569 So.2d. 1197 (Miss., 1990) - - - - -	16
<u>Rose v. Clark</u> , 106 S.Ct. 3101 (1986) - - - - -	20
<u>Russell v. State</u> , 312 So.2d. 422 (Miss., 1975) - - - - -	8
<u>Scott v. State</u> , 791 So.2d. 313 (2001) - - - - -	14
<u>Stirone v. United States</u> , 361 U.S. 212, 80 S.Ct. 27, 4 L.Ed.2d 252 (1960) - - - - -	14-17
STATUTES AND RULES	
28 U.S.C. § 2254 (d)(1) - - - - -	3-A, 20
Section 99-39-7 Miss. Code Annotated - - - - -	5, 6, 7, 8, 9, 10, 11, 12
Section 99-39-1 et. seq. Miss. Code Annotated - - - - -	10
Section 97-3-7(1)(b) Miss. Code Annotated - - - - -	15, 16
Section 97-3-7(2)(1) Miss. Code Annotated - - - - -	15, 16
OTHER	

Table of Authorities Cited

	<u>Page Number</u>
<u>Sullivan v. Louisiana</u> , 113 S.Ct. 2078 (1993) - - - - -	17-19
<u>TOWNER v. State</u> , 812 So.2d. 1109 (2002) - - - - -	14
<u>United States v. BIZZARD</u> , 615 F.3d. 1080 (5 th Cir. 1980) - - - - -	14
<u>United States v. Lockhart</u> , 844 F.3d. 501 (5 th Cir. 2016) - - - - -	15-16
<u>United States v. NUÑEZ</u> , 180 F.3d 227 (1999) - - - - -	15-16
<u>United States v. Salinas</u> , 601 F.3d. 1279 (5 th Cir. 1979) - - - - -	15
<u>Williams v. State</u> , 94 So.3d. 324 (2011) - - - - -	17-20

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT.....	5
CONCLUSION.....	

INDEX TO APPENDICES

APPENDIX A ORDER denying Application for Post Conviction

APPENDIX B ORDER on FORTNER'S Application for Post Conviction.

APPENDIX C Appellee's/State's motion and Brief

APPENDIX D Petitioner's Indictment.

APPENDIX E Jury Instruction S-5.

APPENDIX F Jury Instruction 8.

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 _____ 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 _____ 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 A to the petition and is

reported at No. 2018-M-00528; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the MISSISSIPPI Supreme Court court appears at Appendix "A" to the petition and is

reported at No. 2018-M-00528; 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 _____.

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 Aug. 22, 2018. A copy of that decision appears at Appendix A.

A timely petition for rehearing was thereafter denied on the following date: N/A, 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 N/A (date) on N/A (date) in Application No. A N/A.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment : United States Constitution

All Persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens 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.

Sixth Amendment : United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state 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 accusations to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Fifth Amendment : United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases 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 offense to be twice put in jeopardy of life or limb; nor shall be compelled in any

Constitutional and Statutory Provisions Involved

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.

28 U.S.C. Section 2254 (d)(1):

(d) An application for 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—

- (1) 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.

Article 6, Section 145 B. Mississippi Constitution

the Supreme Court shall consist of nine Judges, that is to say, of three Judges in addition to the six provided for by Section 145 A of this Constitution. ANY FIVE of whom when convened shall constitute a Quorum. The additional Judges herein provided for shall be selected one for and from each of the Supreme Court districts in the manner provided by Section 145 A of this Constitution OR ~~the~~ amendment thereto. Their terms of office shall be as provided by Section 149 of this Constitution OR ~~the~~ amendment thereto.

Constitutional and statutory provisions involved

Mississippi Code Annotated section 99-39-1 provides:

the motion under this article shall be filed as an original civil action in the trial courts except in cases in which the petitioner's conviction and sentence have been appealed to the Supreme Court of Mississippi and there affirmed or the appeal dismissed. Where the conviction and sentence have been affirmed on appeal or the appeal has been dismissed, the motion under this article shall not be filed in the trial court until the motion shall have first been presented to a quorum of the Justices of the Supreme Court of Mississippi, convened for said purpose either in termtime or in vacation, and an order granted allowing the filing of such motion in the trial court.

STATEMENT OF THE CASE

Petitioner was indicted pursuant to a multi-count indictment, by a Pike County, Mississippi, Grand Jury, During the June, 2004 term, for the offenses of Count I, Murder, Pursuant to section 97-3-19 MCA(1972); Count II, Aggravated Assault, Pursuant to section 97-3-7(9)(b) MCA(1972), and Count III, Aggravated Assault, Pursuant to section 97-3-7(9)(b) MCA(1972). Said indictment filed on or about August 13, 2004.

On or about February 12, 2005, a Jury returned a Verdict of Guilty on all counts.

On or about February 28, 2005, Petitioner was sentenced to (15) years on Count II of the indictment, Aggravated Assault.

Petitioner has filed three(3) Post-Conviction Applications, Appendix "A" One denied May 13, 2013, by a three Judge Panel; One denied August 26, 2015, by a three Judge Panel and the one dated August 22, 2018, by a three Judge Panel.

Petitioner only became aware of the three Judge Panel around August 15, 2018.

REASONS FOR GRANTING THE PETITION

On or about August 22, 2018, the Mississippi Supreme Court denied Bussey's Application for Leave to Proceed in the trial Court on Post-Conviction Collateral Relief. See Appendix "A"

The Application was denied by a three Judge Panel of the Court.

In the case of FORKNER v. STATE, 2018-M-00115-SCT, A three Judge Panel of the Mississippi Supreme Court granted Forkner's Application for Leave to Proceed. See Appendix "B"

The State, through the Attorney General's Office file a Motion for Rehearing En Banc, and Motion to stay Enforcement of the Panel's Order, with a brief in support. See Appendix "C"

Bussey's Application for Leave to Proceed is governed by the provisions of Section 99-39-7 MCA, of the Uniform Post-Conviction Collateral Relief Act, (UPCRA) which provides:

A Motion under this Article shall be filed as an original civil action in the trial court, except in cases in which the petitioner's conviction and sentence have been appealed to the Supreme Court of Mississippi and where affirmed or the appeal dismissed. Where the conviction and sentence have been affirmed on appeal or the appeal has been dismissed, the motion under this Article shall not be filed in the trial court until the motion shall have first been presented to a quorum of the Justices of the Supreme Court of Mississippi, convened for

Said purpose either in term time or in vacation, and an order granted allowing the filing of such motion in the trial hand.

(Emphasis Added).

The relevant question here is "What constitutes a Quorum?" and whether permitting a three judge panel to grant or deny an application for leave to proceed filed by prisoners passes constitutional muster pursuant to the state constitution, state statutory law and/or the Fourteenth Amendment right to substantive and fundamental procedural due process?

Section 145 B of the Mississippi Constitution provides:

The Supreme Court shall consist of Nine Judges, that is to say, of three Judges in addition to the six provided for by section 145 A of this Constitution. Any Five of whom when convened shall constitute a Quorum.

Pursuant to Section 145 B a Quorum requires five Justices. A plain reading of Mississippi Code Annotated Section 99-39-7, in conjunction with section 145 B of the Mississippi Constitution mandates that applications for leave to be presented to a Quorum of five Justices

Section 145 B, adopted and ratified in 1950, increased the number of Justices from six to nine, and expressly increase the Quorum Requirements to five Justices.

thus, the Quorum Requirement of Section 145A and Section 149A are in direct conflict with the Quorum Requirement set forth in Section 145B. In the face of such conflict, because section 149A was adopted in 1916, whereas Section 145B was adopted in 1950, Section 145B must control as the last expression of the will of the citizenry.

the state even submits that Mississippi Code Annotated 99-39-1 requires that Applications to Proceed be presented to and considered by "A Quorum of Justices of the Supreme Court of Mississippi" because Section 145B of the Mississippi Constitution provides; that "the Supreme Court shall consist of NINE Judges... any five of whom when convened shall constitute a Quorum". this Court's practice of rendering Judgments on Applications by a three Judge Panel is contrary to statutory and Constitutional Requirements.

The fact that no other type of case is disposed of without consideration of the entire Court indicates that Applications for Leave to Proceed should not be either.

While the Court sits in three Judge Panels for consideration of direct Appeals, the decisions are circulated to the full Court for a vote. Even

Petitions for Certiorari, which are assigned to one Justice for consideration, must ultimately be circulated to the full Court for a vote and requires a vote of four to be sufficiently granted. Indeed, in a decision upholding the constitutionality of the division procedure, this Court noted, as justification for its practice, that "All Petitions for Rehearing are adjudged by the full Court, also no written opinion is handed down until each of the Nine Justices has read it and either concurred therein or noted his dissent." Russell v. State, 312 So. 2d, 422, 425 (Miss. 1975).

The state admits that, "Prisoner's Applications to Proceed are the 'ONLY' type of case which is disposed of without consideration of the entire Court".

Petitioner submits that Section 99-39-7 MCA and Section 145B of the Mississippi Constitution provides the procedure by which Prisoner's Applications for Leave to Proceed are to be presented to and considered by the Court.

Petitioner submits that he was entitled to substantive and fundamental due process of law to have had his Application for Leave to Proceed presented to and considered by a five Judge Quorum.

Pursuant to Rule 10 of the United States Supreme Court Rules, Petitioner sets forth the following compelling Reasons for granting the Writ of Certiorari.

1. The issue of the three Judge Panel is a matter of First Impression:

Petitioner is not aware of any Court (other than the Mississippi Supreme Court) which has considered this issue.

The Mississippi Supreme Court has considered decisions by a three Judge Panel, but not regarding Prisoner's Application for Post-Conviction Collateral Relief.

The Court in Heves v. Laneston, 853 So.2d. 1237 (2003) held that Section 145B of the State Constitution provides that Five Justices constitute a Quorum of the Court.

The State Attorney General's Office agrees with Petitioner's claim that the Supreme Court's decisions on Prisoner's Applications for Post-Conviction Collateral Relief, for a three Judge Panel, is contrary to the Mississippi Constitution and State Statutes Law. Miss. Const., Art. 6, Section 145B and Section 99-29-7. See Appendix "C", Page 7 of Petellees/State's Brief.

2. the Three Judge Panel affects thousands and thousands of prisoners in Mississippi.

Prisoners have a Procedural Due Process Right (Created by the Mississippi Constitution, Section 145-B and State Statutory Law, Section 99-39-7) to have their Applications for Post Conviction Collateral Relief Presented to and considered by a Quorum of Five Justices.

The Mississippi Constitution was amended in 1950 changing the composition of the Court to Nine Justices and holding that Five Justices constituted a Quorum.

The State Legislature passed the Post Conviction Collateral Relief Act in 1984. Section 99-39-1 et seq. MCA.

Petitioners and thousands of other prisoners have been unconstitutionally denied Due Process of Law Pursuant to the 5th and 14th Amendments to the United States Constitution as well as by their own State Constitution and State Statutory Law.

The Three Judge Panels only apply to prisoners application for Post Conviction Collateral Relief.

As stated in the State's Brief at Page 7, last paragraph and Page 8, first paragraph at Appendix "C", no other type of case is disposed of

Without consideration of the entire Court.

Applications for Leave to Proceed should not either.

Page 8, first Paragraph of State's Brief, "this Court's Order, issued by a three Judge Panel, was issued contrary to the express language of both Mississippi Code Annotated Section 99-39-7 and Section 145B of the Mississippi Constitution.

3. It is a matter of Great Public Interest:

It is always in the Public interest for elected officials (such as the Justices of the Mississippi Supreme Court) to obey the Laws, especially the State Constitution and State Statutory Law.

Respect for the Law and the Constitution, particularly by the Justices of the Mississippi Supreme Court, who are elected by the people and who are responsible for the administration of the State's judicial system, is in itself a matter of highest Public interest.

The Constitution is the ultimate expression of the Public interest.

The State Constitution, as the Supreme Law of the State of Mississippi, any suggestion by the

Court that Judicial Precedent is contrary and superior to section 145 B of the Mississippi Constitution is a denial of the Due Process Clause of the State and United States Constitution.

Only the People of the State of Mississippi have the power to alter, amend and/or abolish any portion of the State Constitution. Miss. Const. art. 15, Section 273.

As stated by the state in their brief at page 7, "thus, the Quorum Requirements of Section 145 A and Section 145 B are in direct conflict with the Quorum Requirement set forth in Section 145 B.

In the face of such a conflict, because section was adopted in 1916, whereas Section 145 B was adopted in 1952, Section 145 B must control as the last expression of the will of the citizenry.

The Mississippi Constitution, Section 145 B and the Uniform Post-Conviction Collateral Relief Act Section 99-39-7 are both clear as to what is required by the Mississippi Supreme Court in considering and rendering an opinion on cases coming before the court, including applications filed by pro se prisoners on Post-Conviction Collateral Relief. " Applications must be presented to and considered by a Quorum of the Mississip-

Supreme Court Justices, which according to the Mississippi Constitution is Five Justices, not three.

United States Supreme Court Rule 4(a) states:

2. "Six members of the Court constitute a quorum. See 28 U.S.C. § 1. In the absence of a quorum on any day appointed for holding a session of the Court, the Justices attending — or if no Justice is present, the Clerk or a Deputy Clerk — may announce that the Court will not meet until there is a quorum."

this should also apply to the Supreme Court of Mississippi on Petitioner's Application for Post-Convictions and the Five Justice requirement.

Petitioner submits that any decision by the Mississippi Supreme Court on Petitioner's Application for Post-Conviction Relief, by a three Judge Panel clearly violates the Mississippi Constitution and State Statutory Law, and the 14th Amendment Right to Procedural and Fundamental Due Process found in the United States Constitution.

2. Whether the Mississippi Supreme Court's denial of petitioner's application for leave to proceed on post-conviction relief, holding that "notwithstanding the procedural bars, the claims are without merit, was contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States?

In reference to the procedural bars under Mississippi law, errors affecting fundamental constitutional rights are excepted from the procedural bars of the Uniform Post-Conviction Collateral Relief Act. Pinkney v. State, 191 So.3d, 337 (2015); Turner v. State, 812 So.2d, 1109 (2000) and Scott v. State, 791 So.2d, 313 (2001).

In Stiglitz v. United States, 361 U.S. 212, 215-216, 80 S.Ct. 270, 4 L.Ed.2d, 552 (1960) this Court held: "Therefore, a court cannot permit a defendant to be tried on charges that are not made in the indictment against him.

Ever since Ex parte Baley was decided in 1867, it has been the rule that after an indictment has been returned, its charges may not be broadened through amendment except by the grand jury itself.

The 5th circuit court of appeals has consistently followed Stiglitz and has reversed convictions where the jury might have convicted a defendant on new elements of the offense not charged by the grand jury. United States v. Rizzardi, 615

F. 2d. 1080, 1082 (5th Cir. 1990). The Fifth Circuit has further held that, "a constructive amendment of the indictment is a reversible error per se if there has been a modification at trial of the elements of the crime charged. United States v. Salinas, 601 F.2d. 1279, 1290 (5th Cir. 1979). See also U.S. v. Nuñez 180 F.3d. 227 (1999) and United States v. Lockhart, 844 F.3d. 501 (5th Cir. 2016).

Count II of the indictment clearly reflects that Petitioner was specifically indicted pursuant to Section 97-3-7(a)(b). See Appendix D.

The indictment clearly does not contain any reference to Section 97-3-1(1)(a) which states in pertinent part:

"or causes such injury purposely,
knowingly or recklessly under
circumstances manifesting extreme
indifference to the value of human
life."

Jury instruction #5 granted by the Court does contain the above quoted language. See Appendix E

In United States v. Salinas, 654 F.2d. 319, 334 (5th Cir. Unit A. Aug. 1981) the Court reversed a conviction even though the defendant had been convicted for the same act for which he had been indicted. Still, because the jury charge allowed a conviction for committing that act in

a manner different from that alleged in the indictment, we found a constructive amendment.

In the instant case, although the conviction arose from the same factual incident, the difference between the specific details of the indictment and the general Jury instruction 5-5 pertaining to Aggravated Assault is too great to survive the requirements of the Fifth Amendment. U.S. v. Nunez, 180 F.3d, 227 (1999) and United States v. Leekhart, 844 F.3d, 501 (5th Cir. 2016).

the instant case is analogous to Quick v. State, 516 A.2d, 1197 (Miss., 1990), where the Supreme Court held that "the State can prosecute only on the indictment returned by the Grand Jury and --- the Court has no authority to modify or amend the indictment in any material respect. Id. at 1199. Quick (as was the Petitioner in the instant case) was indicted specifically under section 97-3-7(2)(b) of the Aggravated Assault statute which requires "Purposful, willful and knowing" actions on the part of the accused. However, he (Quick) was convicted under section 97-3-7(2)(a) of the statute which requires "Recklessness and extreme indifference to the value of human life." The Supreme Court Reversed and Remanded the case finding that the Jury instruction clearly contained a "New Element" which was not contained in the original indictment and --- it was evidently this part of the instruction

upon which the Jury returned its verdict.

Petitioner contends that the Mississippi Supreme Court's decision in this case was contrary to and an unreasonable application of Giglio, a clearly established federal law as determined by the United States Supreme Court on this issue.

this Court has held that a "defective reasonable doubt instruction" is a structural error subject to automatic reversal. Sullivan v Louisiana, 113 S.Ct. 2078 (1993).

the trial Court erred in granting Jury Instruction 8 pertaining to an attempt to define reasonable doubt.

In Williams v State 94 So.3d, 384 (2011) the Court stated: "the Circuit Court Refused Proffered Jury Instruction D-5. Because it attempted to define "Reasonable Doubt". Jury instruction D-5 reads as follows:

"the Court instructs the Jury that you are bound in deliberating upon this case, to give -- Williams the benefit of any reasonable doubt that arises out of the Evidence OR lack of Evidence in this case.
" there is always reasonable doubt of the defendant's guilt when the Evidence simply makes it probable that -- Williams is guilty". These probability of guilt will never call for you to convict -- Williams. It is only when after examining the evidence on the whole, you are able to say on your oaths beyond a reasonable doubt that -- Williams is guilty, that the law will permit you to find him guilty.

(William was subsequently asked by the word defendant)
"Loyalty", (under seal and for cross-examination).

It is proper for the court to find that defendant, not
defends that beyond a reasonable doubt he is guilty.
Suffice, and if, if that were not able to say on your
impartial he be able to say that you believe him to be
that the law will permit you to find him guilty. But
beyond a reasonable doubt that the defendant is guilty
the evidence, how are able to say on your oaths that
the defendant, it is only when after examination all of
people will of course will never warrant that to convict

meals is probable that the defendant is guilty. Hence

doubt of the defendant's guilt when the evidence simply
evidence in this case, "Hence is sufficient to determine
suffice that arises out of the evidence did want of
the benefit of any reasonable doubt of the defendant
in determining upon this case, to give the defendant
"the benefit of the doubt that you are bound

In satisfaction of demand

WITNESS IMAGE OF INSTRUCTION 8 IN THE WILLIAMS CASE.
JUROR INSTRUCTION 8 given in the witness case is a

(under seal and for cross-examination)

duty to find --- Williams, "not guilty".
doubt that --- Williams is guilty. If it is your sworn
are not able to say on your oaths, beyond a reasonable
reasonable doubt, that he is guilty, and if, if you
all might be able to say that you believe beyond a

It has been a long standing rule that defines "reasonable doubt" for the Jury is improper. Sullivan v. State 990 So.2d. 406 (Miss. Ct. App. 2008)

the Mississippi Supreme Court has repeatedly and consistently asserted that reasonable doubt defines itself. Lott v. State 902 So.2d. 630, 638 (Miss. Ct. App. 2005). Instructions that attempt to define reasonable doubt are prohibited, because among other reasons, such instructions tell, Jurors that they should be able to state a reason why they have a doubt... however in our Jurisprudence, Jurors are never required to articulate any explanation of their decision.

There appears to be some confusion regarding Jury instruction D-4 and Jury instruction 8 contained in the record. (tr. 419, 430) reflects that 5-8 is basically an intoxication instruction, not reasonable doubt. Also at (tr. 430, l.l. 14-15) 5-8 was denied.

At (tr. 434-435) we see D-4, which is an apparent reasonable doubt instruction. Now the reasonable doubt instruction Appendix "G" came to be Jury instruction 8 is unknown. Yet it was clearly given in this case.

The United States Supreme Court has stated that it has recognized that "most constitutional errors can be harmless." Arizona v. Fulminante, 483 U.S. 392 (1989) Indeed the Court has found error to be "structural" and thus subject to automatic reversal, only in a very limited class of cases.

One class of these cases is (defective reasonable doubt instructions) as we have in the instant case. Sullivan v.

Louisiana 113 S.Ct. 2078 (1993) and "necessarily render a trial fundamentally unfair." Rose v. Clark 106 S.Ct. 3101 (1986). Put another way, these errors deprive defendants of "basic protections" without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence — and no criminal punishment may be regarded as fundamentally fair. Id. at 106 S.Ct. 3101.

This issue was contrary to and an unreasonable application of clearly established federal law as determined by the United States Supreme Court. 28 U.S.C. § 2254(d)(1)

the Mississippi Supreme Court did not follow its own precedents such as Lett v. State, 902 So.2d 630, 638 (Miss. Ct. App. 2005) and Williams v. State, 94 So.3d. 344 (2011).

CONCLUSION

Petitioner Respectfully Petitions The Court to hold that the decisions by a three Judge Panel on Petitioner's application for Post-Conviction is unconstitutional and a violation of Due Process of Law. All decisions by The petition for a writ of certiorari should be granted. A three Judge Panel is invalid.

Respectfully submitted,

Richard Booze # 110686

Date: October 11, 2018