

18-8251

ORIGINAL

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court
FILE

FEB 19 1983

OFFICE OF THE CLERK

ZACHARIAH J. PETERSON

Petitioner,

v.

EILEEN REAMY

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

ZACHARIAH J. PETERSON
#1168819 Pro se
Jefferson City
Correctional Center
8200 No More Victims
Rd.
Jefferson City, MO 65101

QUESTIONS PRESENTED

1. Whether the Eighth Circuit court of Appeals abused its discretion in denying petitioner a COA on his claim on insufficient evidence.

2. Whether the Eighth Circuit court of Appeals abused its discretion in denying petitioner a COA on his claim of ineffective assistance of counsel for failing to object to the states felony murder jury instruction.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Zachariah J. Peterson respectfully requests that a writ of certiorari issue to review the judgment of the United States court of Appeals for the Eighth circuit denying him a C.O.A. that summarily affirmed the district courts denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254 (d)(1). Petitioner also submits this writ of certiorari to present questions of law that call for an exercise of this Courts supervisory review pursuant to Rule 10 (a) and (c).

OPINIONS BELOW

The October 26, 2018 judgment of the Eighth Circuit Court of Appeals denying petitioners application for a certificate of appealability (COA) from the judgment of the district court, and the December 12, 2018 denial of his motion for a rehearing/rehearing en banc and December 20, 2018 mandate are published in the appendix at A-1-A-3. The February 7, 2018 unpublished memorandum, order and judgment of the United States District Court for the Western District of Missouri denying petitioners Writ of Habeas Corpus pursuant to U.S.C. § 2254, is published in the appendix at B-1-B15.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit issued its judgment denying petitioners motion for rehearing/rehearing en banc of the denial of his application for a certificate of appealability on December 12, 2018 and issued its final mandate on December 20, 2018. under 28 U.S.C §

2201 (c) and Rule 13.1, The present petition for a writ of certiorari must be filed by petitioner within (90) days. Jurisdiction of this Court is invoked under 28 U.S.C. § 2254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment of the United States Constitution that provides in pertinent part: No state shall make or enforce a law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law.

This case also involves the Sixth Amendment of the United States Constitution that provides in pertinent part : In all criminal prosecutions the accused shall enjoy the right to have assistance of counsel for his defense.

This case also involves 28 U.S.C. § 2254 which provides in pertinent part;

(a) The Supreme Court, a justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the constitution of laws or treaties of the United States.

(d) an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim-

(1) Resulted in a decision that is contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the

Supreme Court of the United States; or

(2) Resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence in the States Court proceeding.

This case also involves Missouri Statute R.S.M.O. 565.021(2), for felony murder. Which states in pertinent part;

A person commits the crime of second degree murder if he; Commits or attempts to commit any felony, and, in the perpetration of the attempted perpetration of such felony or in the flight from the perpetration or attempted perpetration of such felony, another person is killed as a result of the perpetration or attempted perpetration of such felony or immediate flight from the perpetration or such felony or attempted perpetration of such felony.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

A jury in Boone County, Missouri convicted petitioner, Zachariah J. Peterson in 2012 of 2nd degree felony murder. The trial Court sentenced petitioner to 30 years imprisonment. On direct appeal, the Missouri Court of Appeals, Western District affirmed petitioner's conviction and sentence in *State v. Peterson*, 406 S.W. 2d 478 (Mo App. 2013)

Petitioner subsequently sought post conviction relief pursuant to Missouri Supreme Court Rule 29.15. The State trial Court denied this motion on December 30, 2015. The Missouri Court of Appeals, Western District affirmed the denial of post-conviction relief in *Peterson v. State*, 516 S.W. 3d. 838.

The Missouri Supreme Court denied transfer.

Petitioner then commenced the present federal habeas corpus proceedings by filing a timely habeas corpus petition under 28 U.S.C. § 2254 in the United States District Court for the Western District of Missouri. **Peterson v. Cassady** 17-00592-CV-W-FJG-P. The case was assigned to District Judge Fernando J. Gaitan. After reviewing Peterson's claims, Judge Gaitan denied petitioner habeas relief on all his claims including in conjunction with the issuance of a COA. Including the claims of evidence being insufficient to sustain the conviction, and ineffective assistance of counsel for failing to object to the States felony murder jury instruction. (B-1-B-15)

Petitioner filed a timely notice of appeal, and filed a Application for a COA in the United States Court of Appeals for the Eighth Circuit. On October 26, 2018, The Eighth Circuit denied petitioners Application for a COA. Petitioner than filed a motion for rehearing/rehearing en banc, which was than denied on December 12, 2018, and issued its mandate on December 20, 2018. A-1-A-3.

B. FACTS INVOLVING PRESENTED CLAIMS AND QUESTIONS

In 2011, Petitioner was charged with 2nd degree conventional murder and armed criminal action for the death of James Porter. 45 days before trial, the State indicted petitioner on a alternative count of 2nd degree Felony murder predicated on the underlying felony of attempted distribution of more than 5 grams of marijuana.

In March, 2012, petitioner was taken to trial where the

State alleged that he shot and killed Porter over 20,000 dollars while on the way to purchase 30 pounds of marijuana.

Evidence presented by the State was that Hilda Torres, the States eyewitness, saw 2 people fighting in the front seat of a Tahoe truck. She then heard 2 pops and witnessed the victim, James Porter, exit the vehicle and flee the scene. She testified that the driver than sped from the scene.

(B-1(of Appendix B).

The State presented phone records attempting to place petitioner near the scene of the crime. Those records showed his phone in a sector of the tower encompassing the crime at 2.01 p.m. Which showed his phone in use traveling towards the opposite end of town. (B-1)

Marshall crews, an eyewitness for the State, testified that at 2.10 p.m., he heard gunshots and witnessed a blue Tahoe speed from the scene. (B-1)

Petitioner testified that he tool Porter to purchase the marijuana, left his vehicle with Porter and a man named "JD", and left with a Man named "Tony", (who was the Dealer), to go conduct a seperate drug While Porter inspected and finished his deal.It was planned that JD would drop Porter off, and meet back up with Petitioner and Tony. (B-1)

The jury was instructed on alternative counts of 2nd degree Conventional and felony murder, as well as armed criminal action for both counts. The jury returned a verdict of not guilty of armed criminal action, rejection of conventional murder, but found petitioner guilty of felony murder. (B-1)

On direct appeal, petitioner raised the claim presented in this writ that the evidence was insufficient to sustain a conviction for felony murder. Contending that since the jury did not believe that he was the shooter, thath there was no causal connection between the underlying felony and the death. (B-5).

The Appellate Court rejected petitioners contention that the jury did not believe that he was the shooter. Instead, the Court interpreted the evidence most favorable to the State. Holding that the Court must presume that the jury simply disbelieved petitioners self serving claim that he left his vehicle, and Porter, at the Trailer park to accompany Tony in the conduct of a second, seprate drug deal.(B-8)

Petitioner subsequently filed a 29.15 motion raising the claim presented in this writ[as well as others not raised here] that his trial counsel was ineffective for failing to object to the States felony murder jury instruction on the grounds that the instruction omitted the States theory of causation, as well as any other theory needed to establish liability for felony murder as required by Missouri Approved Instructions.

The Appellate court than changed its position on direct appeal, and held that the jury could have believed that someone else shot the victim. And that the instruction was submitted to cover that scenario without identifying the person who fired that fatal shot. (B-10)

C. THE PRESENT HABEAS CORPUS PROCEEDINGS

Peterson filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Missouri, wherein he claimed, The State Courts adjudication of his claim regarding the insufficiency of the evidence was "contrary to" **Jackson v. Virginia**, 443 U.S. 307, and was based on an unreasonable determination of the facts.

Petitioner also claimed the State Courts adjudication of his claim involving trial counsel being ineffective for failing to object to the States jury instruction was based on an unreasonable determination of the facts. Thereby resulting in an unreasonable application of **Strickland v. Washington**, 466 U.S. 668.(B-1-B-15).

The District Court denied habeas relief without addressing the petitioners allegation regarding the defects of the State Courts decisions. The district court also, in conjunction, denied the issuance of a COA.

After the district court denied habeas relief, petitioner filed a Application for a COA in the United States Court of Appeals for the Eighth Circuit. Which was subsequently denied. Petitioner than filed a motion for rehearing/rehearing en banc which was also denied. (A-1-A-3). The present petition is now before the court for discretionary review.

REASONS FOR GRANTING THE WRIT

I.

CERIORARI SHOULD BE GRANTED BECAUSE THE EIGHTH CIRCUIT COURT OF APPEALS ABUSED ITS DISCRETION IN DENYING PETITIONER A C.O.A. ON HIS CLAIM REGARDING THE INSUFFICIENCY OF THE EVIDENCE

The state courts unreasonable determination of the facts, agreed with by the district court and implicitly affirmed by the Eight circuit court of appeals, warrants this courts discretionary review. The State courts deferential resolution of the evidence on direct appeal is contradicted by the record when considering the verdict of acquittal of armed criminal action and rejection of conventional murder.(B-2)

Yet the state court has disregarded this logic and affirmed the conviction on the states theory that the jury rejected. Further more, the court combined testimony of contradicting theories of the case. Relying on the states theory of petitioner being present at the scene and being the shooter. Then taking portions of petitioners testimony to compound the inference of death being the result of the underlying felony.

Holding first that petitioners story of him introducing the parties, and leaving before Porter was shot was unlikely plausible. But instead a more reasonable inference is that Peterson was still at the scene and the drug deal ongoing at the time Porter was shot. (B-7)

The court then immediately after stated that Porters desire to verify and weigh the drugs was time consuming and indicated Porters lack of trust in Tony and JD.(B-7)

Despite the courts inconsistent findings, the court made a unreasonable determination of the facts when it held that "despite and absence indicating exactly what occurred that led to Porters death, the circumstantial evidence creates a strong inference that it occurred as a result of the drug

transaction. (B-8)..

This Court has held in **Kotteakos v. United States**, 328 U.S. 750, that "it is not the appellate courts function to speculate upon probable reconviction and decide according to how it comes out. **Kotteakos**, 328 U.S. at 764.

The state court decision warrants this Courts review, as it falls under the standard set forth in **Panneti v. Quartermann**, 551 U.S. 930. In which this Court held that "A state courts decision is not entitled to deference under 2254 when the fact finding process relied on by the lower court was not adequate for reaching reasonably correct results, or at a minimum, results in a process that appears to be seriously inadequate for the ascertainment of the truth." **Panetti** 551 U.S. at 954.

The substantiality of the denial of petitioners due process right regarding this claim requires this Courts intervention to remedy such a manifest injustice.

II

CERTIORARI SHOULD BE GRANTED BECAUSE THE EIGHTH CIRCUIT COURT OF APPEALS AND THE DISTRICT COURT HAVE FAILED TO ADDRESS THE CONSTITUTIONALITY OF PETITIONERS CLAIM REGARDING THE STATE COURTS UNREASONABLE DETERMINATION OF THE FACTS ON HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IN TRIAL

A. The state court has missaprehended a material factual issue central to the claim of ineffective assistance of counsel.

Petitioner contended that his trial counsel was ineffective for failing to object to the states felony murder jury

instruction on the grounds that it omitted any theory of causation as suggested by the Missouri approved instruction 314.06 notes on use (3). Which stated that when a person is alternatively charged with alternative counts of conventional and felony murder, the language in the second paragraph should read "the defendant caused the death of the victim by shooting him". (D-3 of Appendix D)

The notes on use give further suggestions for scenarios where the defendants criminal liability is dependent on the conduct of another person. Which is only applicable when the underlying felony is submitted on the theory of accessory liability. (D-5). Which petitioners case was not. Despite the fact that the instructions did not hypothesize any theory of causation, the states court held " The notes on use give permissive instead of mandatory language that permits some leeway in drafting an instruction.

And that since there was evidence from which the jury could have believed that someone else shot the victim, the language of "James Porter was shot", was submitted to cover that scenario without identifying the person who fired the fatal shot".

(B-7.)

The appellate courts holding contradicts its own ruling in *State v. Campbell*, 935 s.w. 2d 394, In which it held that "If an applicable criminal instruction is provided by MAI-Cr, it is mandatory that the court give the instruction as written" *Campbell*, 935 s.w. 2d at 396.

It is not the deviance from the state MAI that establishes

the constitutional violation of ineffective counsel alleged in this writ. It is the fact that the state court decision violates a number of different constitutional rights declared by this Court. One of which is this Courts decision in **In re Winship**, 397 U.S. 358, in which it held that " [T]he due process clause [of the Fourteenth Amendment] protects the accused against conviction except upon proof beyond e reasonable doubt of every fact necessary to constitute the crime which he is charged". **Winship**, at 364.

The state only alleged that petitioner shot and killed the victim. Therefore, in order to say that death was the result of the felony, it was imperative that the jury be required to find the conduct needed to constitute the crime. Though the defendant testified to being involved in the underlying felony, it is not enough to satisfy the element of death being the result of the felony itself. It requires a finding of actual cause as well as proximate cause.

This holding was established in this Courts decision in **Paroline v. United States**, 572 U.S. 434, which held that; "To say that one event proximately caused another is a way of making two separate but related assertions. First it means the former event caused the latter. This is known as actual cause or cause in fact." **Paroline**, 572 U.S. 434, 446.

The state court has undermined the necessity of a finding of causation by holding its language concerning causation to be permissive. Which was necessary in establishing petitioners liability. Whether it be his conduct, or someone who's conduct

it is alleged he is to be responsible for. Depriving petitioner of his constitutional right decalred by this Court in **McCormick v. United States**, 500 U.S. 257, which holds that "In a criminal case, a defendant is constitutionally entitled to have the issue of criminal liability determined by the jury in the first instance" **McCormick**, 500 U.S. 257, 270.

This Court further held that "Appellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support that theory were presented to the jury". *Id.* at 270.

Petitioners entire defense was structured around disputing the states theory of causation alleging that petitioner was the shooter. Despite such, there was no other theory of liability submitted in the instructions. Therefore, counsels failure to assert petitioners due process right on a outcome determinitive error, rendered counsel constitutionally ineffective.

This Court set the standard for the inquiry of whether counsel can be held ineffective in **Strickland v. Washington**, 446 U.S. 668. Holding that "When a defendant challenges a conviction on the grounds of ineffective assistance of counsel, the question is whether a reasonable probability exist that absent the error, the fact finder would have had a reasonable doubt respecting guilt". **Strickland**, 446 U.S.668, 696.

The verdict in this case signifies the juries disbelief in the states theory of petitioner being the shooter. The manner in which this claim has been resolved by the state court, the

district court, and the Eighth Circuit Court of Appeals, warrants this Courts supervisory powers to adequately resolve the deprivation of petitioners constitutional rights.

B. The state court had decision conflicts with other circuits that follow the proximate cause theory of felony murder.

In determining the applicability of felony murder "Missouri uses the foreseeability-proximate cause theory of homicide responsibility of felony murder". *State v. Burrage*, 465 S.W. 3d 77, 80. Under that theory, the court holds that "The identity of the actual killer is irrelevant and a defendant may be responsible for any deaths that are the natural and proximate result of the crime". *State v. Moore*, 580 S.W. 2d 747, 752.

The Missouri court of appeals has used this language in the instant case to escape the need to prove factual causation. By holding that the language petitioner contended was improperly omitted from the instruction to be permissive. Not only is the state courts holding contrary to relevant decisions of this Court, but it also conflicts with other circuits that follow the proximate cause theory.

Illinois, who also follows this theory, acknowledges that causation is an essential element of felony murder. (See *Jenkins v. Nelson*, 157 F.3d 485 6th Cir.). Other states that follow this same concept of law also acknowledge the need for causation in determining the proximate cause inquiry. (*Dixon v. Moore*, 318 fed. appx. 316 for Ohio)(6thCir.)

The Missouri courts application of this concept in this

case, affirmed by the District court and implicitly so by the Eighth Circuit Court of Appeals, has resulted in the enforcement of a law in a manner that abridges the Fourteenth Amendment of due process. This case warrants this courts review in order to directly establish the need for an axiomatic practice of the proximate cause theory of felony murder amongst the circuits.

Both the district court and the eighth circuit court of appeals abused their discretion in denying a COA on petitioners claims.

Under U.S.C. 2253(c)(2), a certificate of appealability may issue if a petitioner has made a substantial showing of a denial of a constitutional right. *Cox v. Norris*, 133 F.3d 565, 569(8th Cir. 1997). Courts have also recognized that the threshold for receiving a COA is a "modest standard". *Randolph v. Kemna*, 276 F.3d 401, 403.(8th Cir. 2002) This Court has explained that "For determining what constitutes the requisite showing for obtaining leave to appeal a district court denial of habeas corpus relief, a petitioner must show that reasonable jurist could debate whether the petition should have been resolved in a different manner or that the issue is adequate to deserve encouragement to proceed further". *Slack v. McDaniel*, 529 U.S. 473, 484.(2000).

This Court in *Barefoot v. Estelle*, 463 U.S. 880(1993) had previously elaborated on this modest standard for the issuance of a COA in the following language;

" In requiring a question of some substance, or a substantial showing of the denial of a federal right,

obviously the petitioner need not show that he would prevail on the merits. He has already failed in that endeavor. Rather he must demonstrate that the issues are debatable amongst jurists of reason. That the Court could resolve the issues in a different manner, or that the questions are adequate to deserve encouragement to proceed further". Id. at 893 (Citations omitted).

Petitioner demonstrated in his habeas corpus , as he has in this writ, that the foregoing claims involved a substantial denial of his constitutional rights. Yet the district court refused to address any aspect of petitioners challenge to the state court decisions. Which was clear when the district court held "The Missouri court of appeals found sufficient evidence that petitioner aided andre in the robbery". (B-5).

Had the district court reviewed petitioners claims, it would have been apparent that petitioner was not tried or found guilty on the theory of aiding and abetting, nor was the underlying felony robbery. The district court simply cited the state court decision and affirmed. Therefore, it cannot be said that the district court adequately assessed the substantiality of petitioners claims.

For all the foregoing reasons, it is clear that the courts thus far have abused their discretion in denying peitioner a COA. The substantiality of petitioners claims are debatabely meritorious.

CONCLUSION

The Writ of Certiorari should be granted.