18-9187

IN THE
SUPREME COURT OF THE UNITED STATES
NO._____

JASON BROOKS
Petitioner,

-vs-

PHIL WEISER, Colorado Attorney General
MATTHEW HANSON, Warden
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATED COURT OF APPEALS
FOR THE TENTH CIRCUIT

Jason Brooks #150014 Pro Se
Sterling Correctional Facility
P.O. Box 6000
Sterling, CO 80751

QUESTIONS PRESENTED

(1)Whether a federal appellate court can substantially change its prior judgment to intentionally sabotage a petitioner being able to file a subsequent habeas petition; changing its decision from:

> "[R]easonable jurists could not debate the correctness of the district court's ruling that Brooks had *failed to exhaust his state remedies*." Brooks v. Archuleta, 681 Fed. Appx. 705, 706 (10th Cir. 2017);
>
> To:
>
> "No reasonable jurist could debate the district court's dismissal on *procedural grounds*." Brooks v. Hanson, 741 Fed. Appx. 599, 600 (10th Cir. 2018)?

(2)Whether the egregious, ever changing reasoning by the Tenth Circuit to preclude having to rule on the merits of Petitioners habeas corpus application is in direct conflict with this Court's precedent set in Slack v. McDaniel, 529 U.S. 473 (2000).

(3) Whether a federal court substantially changing its prior holding improperly deprived petitioner of adequate appellate review?

(3) Whether Rules 35(c)(3)(VI) and (VII) of the Colorado Rules of Criminal Procedure and Colo. Rev. Stat. § 16-5-402 are independent and adequate state grounds to deny federal habeas relief and whether the Tenth Circuit's decision in this case in in direct conflict with *Cone v. Bell*, 556 U.S. 449 (2009)?

PARTIES

The petitioner is Jason Brooks, a prisoner being held at the Sterling Correctional Facility in Sterling, Colorado. The respondents are Phil Weiser, attorney general of the State of Colorado, and Matthew Hanson, the Warden of the Sterling Correctional Facility.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

DECISIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit is cited at *Brooks v. Hanson*, 741 Fed. Appx. 599 (10th Cir. 2018) ("*Brooks IV*") and a copy is attached as Appendix A to this petition. The order of the United States District Court denying the § 2254 motion as successive is unreported and not cited anywhere. A copy is attached as Appendix B to this petition.

The order of the state trial court, which the Tenth Circuit had originally determined to be still "pending" is unpublished and reported at *People v. Brooks*, 2017 Colo. App. LEXIS 852, *cert. denied*, *Brooks v. People*, 2017 Colo. LEXIS 995 (Colo., Nov. 13, 2017); a copy is attached as Appendix C to this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on November 1, 2018. An order denying a petition for rehearing was entered on January 25, 2019, and a copy of that order is attached as Appendix D to this petition. Jurisdiction is conferred by 28 U. S. C. § 1254(1) and the ability for GVR (if necessary) is conferred by 28 U.S.C. § 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Amendment XIV to the United States Constitution, which provides:

Section 1. 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.

STATEMENT OF THE CASE

Brooks originally filed a second habeas corpus action, case number 16-cv-00895-LTB, after Justice Gorsuch declared Brooks' current claim as being a "newly-arising objection to the State's breach of the plea agreement through recent enforcement of the interest provision in § 18-1.3-603(4). *In re Brooks*, 2016 U.S. App. LEXIS 23786, *3 (10th Cir. 2016); however, the district court ultimately found "that Mr. Brooks *failed to exhaust* an available state remedy." *Brooks v. Archuleta*, 2016 U.S. Dist. LEXIS 188418, *7-8 (D. Colo.). The Tenth Circuit went on to uphold the district court's ruling, but denied the petition on a completely different theory, believing Brooks did appeal the trial courts order, declaring the following:

> "Brooks filed a habeas petition with the federal district court *before the Colorado Court of Appeals reached a decision*. Under the exhaustion-of-remedies requirement, a petitioner must present the federal issue 'to the

highest state court.' Dever v. Kansas State Penitentiary, 36 F.3d 1531, 1534 (10th Cir. 1994). Because Brooks failed to present his claim to the highest Colorado court, we conclude that reasonable jurists could not debate the correctness of the *district court's ruling that Brooks had failed to exhaust his state remedies*." Brooks v. Archuleta, 681 Fed. Appx. 705, 706 (10th Cir. Colo. Mar. 13, 2017))("*Brooks I*")?.

Petitioner believed, however, that the Tenth Circuit had decided the merits of the case upon a pending appeal of the inappropriate state case—which was an appeal of a third state postconviction motion Brooks filed pursuant to Crim. P. 35(a) attacking the legality of restitution interest being applied sixty-five months after his conviction had become final and the resulting illegal inducement of his plea. Brooks subsequently petitioned for a writ of certiorari to this Court based upon this seeming mistake, which was denied. *See* Brooks v. Archuleta, 138 S. Ct. 132, 199 L. Ed. 2d 188 (U.S., Oct. 2, 2017). Brooks then petitioned the district court to re-open the judgment pursuant to Rule 60(b) multiple times due to this seeming error, which was repeatedly denied because the Tenth Circuit apparently believed it had made the correct ruling originally. *See* Brooks v. Archuleta, 702 Fed. Appx. 790 (10th Cir. Colo., Aug. 18, 2017)("*Brooks II*"); Brooks v. Archuleta, 717 Fed. Appx. 831 (10th Cir. Colo. 2018)("*Brooks III*"). This Court also considered *Brooks III* and denied granting certiorari, *see* Brooks v. Medina, 2019 U.S. LEXIS 2585 (April 15, 2019), assumedly premised upon the belief that

Petitioner could simply file an additional habeas corpus petition once the "pending" Colorado Court of Appeals decision was made final; however, such inference has been sabotaged by the Tenth Circuits ever changing rationale to deny having to make a merits determination on Petitioners claims.

Since the district court originally found that Petitioner "*failed to exhaust an available state remedy*," Brooks, 2016 U.S. Dist. LEXIS 188418 at *8, and because the Tenth Circuit asserted that "Brooks filed a habeas petition with the federal district court *before the Colorado Court of Appeals reached a decision*," Brooks I, 681 Fed. Appx. at 706, it is undisputed that the Tenth Circuit believed Brooks failed to exhaust an *available* state remedy, despite the State court itself expressly time-barring Brooks' claims. The Petitioner did, however, go on to exhaust his state remedies and appealed the issue through to the Colorado Supreme Court in a subsequent appeal, which was determined procedurally barred by the Colorado Court of Appeals and ultimately proven futile. *See* People v. Brooks, 2017 Colo. App. LEXIS 852 (Colo. App. 2017), *certiorari denied*, Brooks v. People, 2017 Colo. LEXIS 995 (Colo., Nov. 13, 2017). As such, none of this Court's cases has "ever suggested that a prisoner whose habeas petition was dismissed for failure to exhaust state remedies, and *who then did exhaust those remedies and returned to federal court*, was by such action filing a successive petition. A court where such a petition was filed *could* adjudicate these claims under the same standard as would

govern those made in any other first petition." *Slack*, 529 U.S. at 487(*citing Stewart v. Martinez-Villareal*, 523 U.S. at 644). Since Brooks completed exhaustion of that Court of Appeals decision to the Colorado Supreme Court on November 13, 2017 (which the Tenth Circuit determined to be "pending" in *Brooks I*), Brooks should have been permitted to file a second habeas petition and it should not have been considered second or successive pursuant to *Slack*. The district court, therefore, had jurisdiction to rule on the merits of Petitioners habeas application.

Because the Tenth Circuit substantially changed its ruling from a failure to exhaust in *Brooks I* to procedural default in *Brooks IV*, the Tenth Circuit ultimately deprived Petitioner of adequate federal appellate review in *Brooks I*. Had the Tenth Circuit believed in *Brooks I* that Petitioner was denied on procedural grounds rather than a failure to exhaust, the Tenth Circuit would have been mandated to address Brooks' arguments for reasons he could not comply with the states procedural rules pursuant to *Coleman v. Thompson*, 501 U.S. 722 (1991) and *Murray v. Carrier*, 477 U.S. 478 (1986). The Tenth Circuit subverted this process, however, by simply asserting "Brooks filed a habeas petition with the federal district court before the Colorado Court of Appeals reached a decision." *Brooks I*, 681 Fed. Appx. at 706. The Tenth Circuit's poor faith adjudication in *Brooks I* continued when the Tenth Circuit illogically concluded the following:

> "[T]he factual basis for Brooks's claims was reasonably available because it arose before he filed the post-conviction motions. Specifically, in July 2015, the factual basis arose when Brooks received the court clerk's notice. Therefore, by August 2015, when he filed for post-conviction relief, Brooks knew the claims' factual basis. In fact, he based his claims for post-conviction relief on the 1% interest charge. Thus, Brooks has failed to show cause for his failure to exhaust." *Brooks I*, 681 Fed. Appx. at 707.

This finding makes absolutely no sense because by July 2015' any new attempt by Brooks' to raise the claim in state court was barred under state procedural rules, *see* Colo. R. Crim. P. 35(c)(3)(VII); Colo. Rev. Stat. § 16-5-402, directly contradicting Justice Gorsuch's finding that Brooks' claim was newly arising. These facts should have subjected Brooks' claim to anticipatory procedural default, but since there was an actual "definitive ruling" from the state court procedurally barring Brooks' claims, exhaustion should have been waived pursuant to *Anderson v. Sirmons*, 476 F.3d 1131 (10th Cir. 2007). Brooks did not even need to attempt to file a state postconviction motion at the time he was made aware of the $50,000 monthly restitution penalty in July 2015'—anticipatory procedural default governed—but Brooks did not want the federal court to accuse him of attempting to "expedite federal review." *Vasquez v. Hillery*, 4747 U.S. 254, 260 (1986). Resultantly, Brooks has basically been penalized for filing the postconviction motion in state court because had he not even filed it, cause and

prejudice for reasons he could not comply with the state procedural rules would have been addressed on the merits—which has not occurred to this day.

In *Gutierrez v. Moriarty*, 922 F.2d 1464 (10th Cir. 1991) the Tenth Circuit held that when "state courts have expressly reserved their unfettered discretion to waive [procedural default] rule[s]," the "circumstances argues against the conclusion that the courts apply the rule regularly and evenhandedly." *Id.* at 1470 (*citing Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 233-34 (1969)(where state court had not applied its rule so consistently as to amount to self-denial of the power to entertain the federal claim if it wished to do so, federal court review not barred)). The fact remains, however, Rules 35(c)(3)(VI) and (VII) of the Colorado Rules of Criminal Procedure and Colo. Rev. Stat. § 16-5-402 are not independent and adequate state grounds to preclude federal habeas review because they are not applied evenhandedly. Two different judges in the same trial court, within a month, came to diametrically opposed ruling on how these inadequate procedural rules should be applied in Brooks' case. When Brooks first filed a postconviction motion on this issue August 5, 2015, Weld County District Court Judge Timothy Kerns believed that these procedural bars could not be a basis to deny Brooks the opportunity to have the claim adjudicated on the merits. On October 5, 2015, Judge Kerns reviewed Brooks' pro se 35(c) motion and stated, "[d]efendant raises issues of ineffective assistance of counsel. The allegation raised in Defendant's motion

are specific, and if true, raise an issue of whether restitution interest can be ordered or whether there is other relief under C.R. Crim. P. 35(c)." *See* Appendix E. Pursuant to C.R. Crim. P. 35(c)(2)(IV), since "there exist[ed] evidence of material facts, not theretofore presented and heard, which, by the exercise of reasonable diligence, could not have been known to or learned by the defendant or his attorney prior to the submission of the issues to the court or jury, and which requires vacation of the conviction or sentence in the interest of justice," the claim cannot be barred, which is reason Judge Kerns refused to [redacted] procedurally bar Brooks' claims. Judge Kerns then ordered a status conference to commence on November 13, 2015. Unbeknownst to Brooks, the state court transferred the case to another division in January 2016, where Judge Julie Hoskins presided. Once Ms. Hoskins received Brooks postconviction motion, after 4 months of adjudication in process by Judge Kerns, she went on to deny Brooks' postconviction motion *sua sponte* on January 13, 2016, holding that Brooks was procedurally barred from filing the application based upon rules Crim. P. 35(c)(3)(VI) and (VII) of the Colorado Rules of Criminal Procedure and Colo. Rev. Stat. § 16-5-402. *See* Appendix F. These diametrically opposed findings proves Colorado's procedural rules are not applied "evenhandedly," nor can they be considered "adequate."

Despite these undisputed facts, the Tenth Circuit broke conformity of its own decision in *LeBere v. Abbott*, 732 F.3d 1224 (10th Cir. 2013) and violated this

Court's holding in both *Cone v. Bell*, 556 U.S. 449 (2009) and *Slack v. McDaniel*, supra.

BASIS FOR FEDERAL JURISDICTION

This case raises a question of interpretation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The district court had jurisdiction under the general federal jurisdiction conferred by 28 U.S.C. § 1331.

REASONS FOR GRANTING THE WRIT OR GVR

Title 28 U.S.C. § 2106 appears on its face to confer upon this Court a broad power to GVR: "The Supreme Court or any other court of appellate jurisdiction may . . . vacate . . . any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and . . . require such further proceedings to be had as may be just under the circumstances." *Lawrence v. Chater*, 516 U.S. 163, 166, 116 S. Ct. 604 (1996). "In an appropriate case, a GVR order conserves the scarce resources of this Court that might otherwise be expended on plenary consideration, assists the court below by flagging a particular issue that it does not appear to have fully considered, assists this Court by procuring the benefit of the lower court's insight before we rule on the merits, and alleviates the "potential for unequal treatment" that is inherent in our inability to grant plenary review of all pending cases raising similar issues, *see United States v.*

Johnson, 457 U.S. 537, 556, n. 16, 73 L. Ed. 2d 202, 102 S. Ct. 2579 (1982)." *Lawrence*, 516 U.S. at 167.

A. Conflicts with decisions of Other Courts.

This Court has concluded that neither prior determination nor waiver provides an *independent and adequate* state ground for denying review of federal claims, which is the entire basis of the Tenth Circuits newly created justification for dismissal. *See Cone* 556 U.S. at 465. In *Cone*, this Court decided that a state court's refusal to consider the merits of a claim because the claim was previously determined [or waived] is *not a proper basis for denying federal habeas review. Lebere*, 732 F.3d at 1229 (*citing Cone*, 556 U.S at 466). Subsequently, Rules 35(c)(3)(VI) and (VII) of the Colorado Rules of Criminal Procedure and Colo. Rev. Stat. § 16-5-402 could not plausibly be independent and adequate state grounds to deny federal habeas relief pursuant to *Cone*. The Tenth Circuit refused to address this issue in any capacity, which Brooks preserved and posited on appeal, and chose to destroy uniformity of its own decision in *LeBere*.

The Tenth Circuit specifically identified that, "[g]enerally, when a state court dismisses a federal claim on an 'independent and adequate' procedural ground, the doctrine of procedural default forecloses federal review. *Coleman*, 501 U.S. at 729-32. The question, then, is whether the application of the state's successive bar

presents a barrier to federal review. ***Not necessarily***." Lebere, 732 F.3d at 1229. This "not necessarily" language, however, has permitted the Tenth Circuit to waiver on whether or not Colorado's procedural rules are independent and adequate state grounds to preclude habeas review, which should not be tolerated. The Tenth Circuit further articulated in *LeBere* the following:

> "The Court's decision in *Cone* controls the outcome of this case. As in *Cone*, LeBere raised a state-law nondisclosure claim on direct appeal and, based on the same facts, a Brady claim on post-conviction review. And, as in *Cone*, the post-conviction court applied the state bar on successive claims in declining to reach the merits [which is exactly what the CCOA and postconviction court did in denying Brooks claims]. If the application of the successive bar in *Cone* did not affect the availability of federal review, the same should be true for a nearly identical rule here." *Id.* at 1230.

Accordingly, the same should also have applied to Brooks in this case, but the Tenth Circuit instead chose to destroy uniformity of its own decisions, deprived Brooks of appellate review in *Brooks I* by changing the entire foundation of that denial, refused to address cause and prejudice arguments Brooks' made as to reasoning he could not comply with the State's procedural rules, ignored the fact that Rules 35(c)(3)(VI) and (VII) of the Colorado Rules of Criminal Procedure and Colo. Rev. Stat. § 16-5-402 are not independent and adequate state grounds to deny federal habeas relief, and simply chose to sabotaged Petitioners claim.

The fact remains Brooks fully exhausted his state remedies the Tenth Circuit determined to be "pending" in *Brooks I* and none of this Court's cases has "ever suggested that a prisoner whose habeas petition was dismissed for failure to exhaust state remedies, and *who then did exhaust those remedies and returned to federal court*, was by such action filing a successive petition. A court where such a petition was filed *could* adjudicate these claims under the same standard as would govern those made in any other first petition." Slack, 529 U.S. at 487(*citing* Stewart v. Martinez-Villareal, 523 U.S. at 644). The Tenth Circuits finding are, therefore, in direct conflict with this Court's decisions in both *Cone* and *Slack*, Brooks' habeas petition could not have possibly been considered second or successive, and the district court had clear jurisdiction to rule of Petitioners habeas application.

B. Importance of the Questions Presented

This case presents basic questions of fundamental fairness, routine due process procedures, and the interest of judicial economy, which is of great public importance. The Tenth Circuit substantially changed its entire reasoning for denial in *Brooks I* to *Brooks IV* and in doing so have attempted to alter reality. What is going on in this Country?? We have a President whom is stuck in his own delusion and now federal courts are attempting to alter reality in this same fashion... ??? What has occurred in this case is shocking. In *Brooks I* the Tenth Circuit basically

said, "Mr. Brooks, we find that the wall is white, the wall will always be white, and we are denying you because the wall is white!!!" Now, in *Brooks IV*, the Tenth Circuit has postured, "Mr. Brooks we told you the wall is black, the wall has always been black, and we denied you previously because we said the wall was black!!!" This Court has an independent duty to scrutinize the application of state rules that bar review of federal claims, Lee v. Kemna, 534 U.S. 362, 375 (2002), and under no circumstance should a federal appellate court be allowed to engage in such egregious conduct. The law of case doctrine should govern, as the Tenth Circuit is mandated to follow its previous decisions—a court cannot change its holding from *Brooks I* to *Brooks IV* without everyone on earth seeing such blatant, manifest contradiction. This Court has clarified that the adequacy of state procedural bars to the assertion of federal questions "is not within the State's prerogative finally to decide; rather, adequacy 'is itself a federal question.'" Douglas v. Alabama, 380 U.S. 415, 422 (1965). Rules 35(c)(3)(VI) and (VII) of the Colorado Rules of Criminal Procedure and Colo. Rev. Stat. § 16-5-402 "are inadequate, under the extraordinary circumstances of this case, to close out [Brooks] federal, fair-opportunity-to-defend claim." Lee, 534 U.S. at 376. "There are [also] exceptional cases in which exorbitant application of a generally sound rule renders the state ground *inadequate* to stop consideration of a federal question. *See* Davis v. Wechsler, 263 U.S. 22, 24 (1923) (Holmes, J.) ("Whatever springes

the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."). This case fits within that limited category," *Id*, as Brooks exhausted his state remedies and did everything required to present his question to the federal court.

Although the State is obliged to "prosecute with earnestness and vigor," it "is as much [its] duty to refrain from *improper* methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v. United States, 295 U.S. 78, 88 (1935). The State of Colorado hid a $25 + million interest penalty from Brooks for sixty-five months in order to illegally induce his plea and then procedurally bar his ability to collaterally attack the validity of his plea after finally imposing the penalty. Preventing Brooks the ability to have this claim adjudicated on the merits defies the very spirit of the Due Process Clause of the United States Constitution.

CONCLUSION

For the foregoing reasons, certiorari or GVR should be granted in this case.

Respectfully submitted on this 24th day of April, 2019.