19-5212

No. 18A1042

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

LAREY DOUGLAS BROWN — 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

LAREY DOUGLAS BROWN, TDCJ #1683629
(Your Name)

TELFORD UNIT, 3899 St.Hwy.98
(Address)

NEW BOSTON, TEXAS 75570
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

QESTION 1

Did the AEDPA's 28§2254(e) legislation do away with Supreme Court precedent regarding the 14th Amendment Due Process Clause's entitlement to a full and fair hearing to state prisoners in state-court proceedings, such as state habeas court factfinding hearings, and thus preclude a state prisoner's former ability to overcome the presumption of correctness accorded such (paper) hearings, even if they are not full and fair?

QUESTION 2

Does overcoming a state prisoner's state procedural-default/exhaustion-requirement failure through a miscarriage of justice attack necessarily require the demonstration of new factual evidence to show actual innocence, where the jury failed to recognize the insufficiency of the facts for conviction testified to at trial--which facts were not diligently found and presented to either the state appellate court by appellant's ineffectual appellate attorney nor to the state habeas court by the indigent petitioner's inept lay attorney (inmate writ writer) in violation of the Constitution's 6th (ineffective assistance of appellate counsel) and 14th (due process) Amendments?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[x] 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:

1. LORIE DAVIS, Director, TDCJ-ID

2. CHARLES ARNONE, Asst. Attorney General of Texas

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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

[x] 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,
[x] is unpublished.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,
[x] 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 1-14-2019.

[ ] No petition for rehearing was timely filed in my case.

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 2-13-19, and a copy of the order denying rehearing appears at Appendix C.

[x] An extension of time to file the petition for a writ of certiorari was granted to and including 7-11-2019 (date) on 4-10-2019 (date) in Application No. 18 A 1042.

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

The following statutory and constitutional provisions are pertinent:

U.S. CONSTITUTION, AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right ...to have the Assistance of Counsel for his defence.

U.S. CONSTITUTION, AMENDMENT XIV

Section 1. ... No State shallmake 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....

28 U.S.C. § 2254

(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 ...

(B)(i) there is an absence of available State corrective process; or

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

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be esstopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(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 was 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 presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of

a factual issue made by a State court shall be presumed to be correct. The applishall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that-- (A) the claim relies on--...(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the ...offense.

TEXAS PENAL CODE § 22.021. Aggravated Sexual Assault

(a) A person commits an offense:

(1) if the person:

(A) intentionally or knowingly: ...

(ii) causes the penetration of the mouth of another person by the sexual organ of the actor, without that person's consent ... .

STATEMENT OF THE CASE

Petitioner Brown contends he is being unlawfully confined and illegally restrained of his liberty by Lorie Davis, Director of Texas Department of Criminal Justice, Institutional Division,from a judgment and sentence of conviction rendered in Cause No. 30229-A by the 3rd Judicial District Court of Anderson County, Texas. Brown is serving a concurrent sentence of 37 years imprisonment for three counts of aggravated sexual assault with a deadly weapon, among other things. In September, 2008,the complainant accompanied Brown to his recently renovated trailer. Though she had been trying to end her relationship with Brown, she went, expecting to get some drugs. They did not get any drugs that evening; but after dinner, they engaged in consensual sex. The next morning Brown wanted to have sex again, but she refused. Brown beat her with a rifle and his hands, then sexually assaulted her anally, vaginally, and allegedly orally. Later that morning, she fled to a nearby trailer, but Brown caught up with her, forced her into his truck, drove her to a lake, and beat her again, threatening death. Eventually, he relented and took her to a mutual friend's home. Another friend took her to a hospital to see about her bad-looking injuries. Hospital personnel alerted police who began an investigation leading to these charges. Brown was tried and convicted in November, 2010. He appealed in 2011 to the 12th Court of Appeals. Brown's appellate attorney presented 3 issues but did not attack the sufficiency of the evidence, especially in regard to count one in guilt-innocence or to the punishment enhancement process. The convictions were affirmed in September 2011. Brown filed his article 11.07 state habeas petition in2012, request-

ing an evidentiary hearing at the same time and asking for the recusal of his trial judge form the habeas court. The recusal of Judge Bently was granted in December 2013; but Judge Pam Fletcher, the substitute habeas judge, chose to carry out a paper hearing rather than a full evidentiary hearing. On November 20,2013, prior to the trial judge's recusal, the Texas Court of Criminal Appeals had issued an "Order" requesting the habeas trial-court to carry out certain factual and legal inquiries. Judge Fletcher carried out most of the ordered tasks, but not all. Judge Fletcher issued her findings of facts and conclusions of law on April, 2014; but unfortunately, some of her factual findings were incorrect and/or confusing. The Court of Criminal Appeals denied Brown's 11.07 in 2014, after which he filed his :2254 federal habeas petition. Unfortunately, his new writ writer was not familiar with AEDPA's standards and prohibition of relitigation. Though the same 29 state habeas grounds were submitted on the federal habeas, the inmate failed to brief most of the grounds, trying to reference them to Brown's previous state habeas. The district court rejected Brown's premature motions for discovery and evidentiary hearing and by September and December,2017, accepted the magistrate's recommendations to dismiss Brown's petition with prejudice. denied his petition, and denied his application for a COA. Brown appealed to the Fifth Circuit Court of Appeals in November 2017, requesting a COA. The 5th Circuit denied his application for COA and leave to proceed in forma pauperis, as well as his request for a rehearing in January 2019 and February 2019. Brown requested an extension of time to file his Certiorari because of a unit lockdown in March 2019. On April 10, 2019, Justice Alito granted an extension of time up to July 11, 2019.

REASONS FOR GRANTING THE PETITION

1. The AEDPA of 1996 made various changes to the federal habeas law [i.e.,28 USC§2254] affecting state prisoners. Prior to the AEDPA, the Supreme Court and other federal courts had held that due process entitled a prisoner or defendent the right to a fair and full hearing in judicial proceedings--not just habeas ones. In re Murchison, 349 US 133 (1955).See also Mathews v Eldridge,429 US 319(discussing Due Process). The Supreme Court had also stated that a"paper" habeas fact-finding hearing was more likely to be full and fair and accorded a presumption of correctness if the habeas judge wasthe same person as the trial judge. Thompson v Keohane, 116 S.Ct.457 (1995);Miller v Fenton, 106 S.Ct.445(1985). From these Supreme Court decisions from 1986 to 1996, the Fifth Circuit developed the corollary principle that if a paper hearing were conducted by a habeas judge who was not the trial judge, then a state prisoner cannot be guaranteed a full and fair hearing, especially where issues of credibility and demeanor were at issue and thus a presumption of correctness would not be due. Nethery v Collins, 993 F2d 1154 (1993); Perillo v Johnson, 79 F3d 441 (1996). This principle persisted into the early post-AEDPA era, until the 5th Circuit held that since §2254(e)(1) did not actually show that a due process full and fair factfinding hearing was actually even worded in the law, then a due process quality full and fair hearing was not a precondition necessary to accord a presumption of correctness to a state habeas court's findings of fact.* It would seem that AEDPA WORDING (or lack of wording) could trump a well-established Supreme Court due process precedential principle and its corollary so that a state prisoner is effectively no longer entitled to a full and fair hearing and may or can not point to its

*Valdez v Cockrell, 274 F3d 941 (2001)

absence to rebut the automatic presumption of correctness, especially in situations as in Brown's case. Here, his trial judge had been recused from the habeas court and the substitute judge (Fletcher) in stead of conducting a full and fair evidentiary hearing with testifying witnesses,etc., conducted a paper hearing that wasflawed in many respects--thus bearing out the types of errors that prior federal courts, including the Supreme Court, had predicted could occur in this type of setting with a substitute habeas judge.[Interestingly, the 5th Circuit has had to make an exception to this new approach where a Ford claim is involved.] Brown pointed out, for instance, to the district and circuit courts that the trial court reporter had mistakenly typed into the record that a photograph of a white card was a photo of a "car." Judge Fletcher claimed in her finding of facts #34 that this photo of the note card with a date on it was a photo of a "car," suggesting that she had never looked at the photo but merely wrote down the court reporter's typographical error. Judge Fletcher also claimed a photo of an injury to the victim was a pre-dated photo from before the assault in question at trial,but she gave an exhibit number of a photo of an injury taken after the assault in question at trial. Thus, it was never clear which photo, if any, was a pre-dated photo nor how she determined such. Apparently, Judge Fletcher used other people's descriptions of the factual evidence rather than actually looking at it anew to determine it true nature. This calls into question the reliability of her findings of fact. For example, she apparently accepted as true an error in Defence Attorney Whitaker's affidavit where he stated that Brown, after the alleged 2008 assault in question, had been evaluated in Vernon State Hospital and, when found competent, had been returned to Anderson County for trial. Yet

Judge Fletcher ignored actual documents from Brown's 11.07 habeas exhibits showing that his only stay at Vernon was briefly in 2005, after which he was returned to Smith County for a trial unrelated to the 2008 assault. Also Judge Fletcher never determined whether a prosecution witness had been offered a plea deal from the State in exchange for testifying against Brown--one of the seven issues the Court of Criminal Appeals had ordered the state habeas court to resolve in its "Order" of 11-20-2013. Brown had requested a full and fair evidentiary hearing from the state habeas court, but did not get one. He requested an evidentiary hearing from the federal habeas court or to be sent back to the State courts for a proper evidentiary hearing inorder todevelop true facts to resolve disputed issues in several of his state and federal habeas grounds (e.g., Nos. 2,4-10,11,13,15,16,18, 20, 22,24,25, & 29). The federal habeas courts adopted a presumption of correctness to the state habeas court's facts and ignored Brown's rebuttal. He was denied the writ and a COA. Brown has demonstrated a fair sample of clearly erroneous facts adduced at the state habeas court's merit adjudication to indicate that the resulting state-court decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28USC § 2254 (d)(2). Full and fair hearings--factfinding or otherwise--should still be encouraged throughout all the Circuits by the Supreme Court; and those paper hearings not affording such a due process quality should not be automatically granted a presumption of correctness in violation of the 14th Amendment's Due Process as in Brown' case.

2. Brown was charged with 3 counts of aggravated sexual assault in 2008. Though the prosecutor elicited the required testimony to bring out the offense elements of counts 2 and 3, she failed to elicit the main

proper offense element for conviction of count 1 as enumerated in the Texas Penal Code. In order to prove that Brown violated the law in regard to count 1, the prosecutor must prove to the jury beyond a reasonable doubt all of the elements of the offense, including specifically: "(ii) causes the penetration of the mouth of another by the sexual organ of the actor...," Tx.Pen.C.§ 22.021(a)(1)(A)(ii), or in the words of the jury charge:"Now, if you find from the evidence beyond a reasonable doubt that...the defendant...did then and there intentionally and knowingly cause the penetration of the mouth, of [A.H.] by the defendant's sexual organ ..." RR Vol. 5,p.16;Fiore v White, 531 US 225 (2001): Jackson v Va., 443 US 307 (1979); In re Winship, 397 US 358 (1970). Nowhere in the trial testimony by A.H. did she state that Brown's "sexual organ or penis" was in her "mouth" by any means. Both A.H. and the prosecutor frequently used the term "oral sex," which has multiple meanings; but neither A.H. nor anyone else ever defined that term for purposes of satisfying the required element for count 1. See RR Vol.3,pgs 36,38,89. Nowhere in the Penal Code 22.021 is the general term "oral sex" used as a necessary element for conviction. Tx.Pen.C. § 22.021. Thus the required element stated above and designated in the Penal Code by "(ii)" was never satisfied, and the jury could not have and did not follow the jury charge, but convicted Brown of count 1 on insufficient evidence. Fiore, supra. Since sufficiency of the evidence can only be examined on direct appeal and Brown's appellate attorney never raised this insufficiency of evidence, Brown's appellate attorney was deficient in his performance* Strickland v Washington, 466 US 668 (1984); Stalling v U.S., 536 F3d 624(7thCir.2008). To convict someone when one or more offense elements are not proven by reasonable doubt is 100% prejudicial. Strickland, supra; Fiore, supra. Although Brown's state habeas ground # 29 attacked his appellate attorney for

*6th Amendment violation

rendering ineffective assistance of counsel for failing to raise sufficiency of the evidence and he requested an evidentiary hearing to diligently develop a factual record base [Williams v Taylor, 529 US 420 (2000); McDonald v Johnson, 139 F3d 1056 (5th Cir 1998)], his inmate writ-writer/lay-attorney basically presented a general argument and did not raise the more specific insufficient element issues in regard to count one and the enhancement process. Though neither the State nor federal habeas court contested this "new" aspect of the nor raised an issue of procedural default or exhaustion failure, the State did not expressly waive it nor did the district court dismiss it. 28 USC § 2254 (b)(3). They simply ignored it, whereas Brown's lay and appellate attorneys neglected or did not recognize this more specific issue. Brown raised the issue in federal court to either further strengthen his IAC claim re evidence sufficiency or to see if the federal court would send it back to either the State court(s) or possibly even get a grant of acquittal for count 1. Burks v U.S., 437 US 1. If there is no recognizable cause and prejudice to overcome the procedural default or exhaustion failure, then Brown must rely on the fact that not resolving this claim in his favor when he should have gotten an acquittal on count 1 at trial, leaves him with a fundamental miscarriage of justice result. Normally he would have to raise actual innocence, but that usually requires new factual evidence. But is new evidence necessary in his case? Is not the fact that the lack of the penal code offense element that was ignored by the prosecution and the jury sufficient to make a colorable showing of factual innocence? Kuhlmann v Wilson, 106 S.Ct. 2616 (1985); Schlup v Delo, 115 S.Ct.851 (1995). The State habeas court and/or Court of Criminal Appeals' decision resulted in a decision that was contrary

to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court's decisions in Fiore, Strickland, Jackson, and In re Winship; and/or considering the facts not presented properly at trial by the State, as noted above, the State court decision resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in State court proceedings. 28 USC § 2254(d)(1),(2). Again, through the Supreme Court's supervisory powers, surely petitioner Brown can get relief by returning to the State appellate court or habeas court or even be granted an acquittal on count 1.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LARRY DOUGLAS BROWN

Date: 7-8-19

AMERICANS
With
DISABILITIES
ACT