19-5428

NO. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

HERRON KENT DUCKETT
PETITIONER

vs.

LORIE DAVIS, Director
RESPONDENT

On Petition For A Writ Of Certiorari To

United States Court of Appeals, 5th Circuit

Petition For Writ of Certiorari

HERRON KENT DUCKETT - Pro Se
Eastham Unit
2665 Prison Rd. #1
Lovelady, Texas 75851
TDCJ #1920602

QUESTION(S) PRESENTED

1) Whether the decision of the court is in conflict with Supreme Court ruling concerning ineffective assistance of counsel under **STRICKLAND v. WASHINGTON.**

2) Whether the decision of the court is in conflict with Supreme Court ruling concerning ineffective assistance of counsel under **BATSON v. KENTUCKY**.

3) Is there enough sufficient evidence to sustain the deadly weapon (hypothetical) finding in the Judgement of Conviction.

LIST OF PARTIES

APPELLANT: Herron Kent Duckett — Eastham Unit, TDCJ
Petitioner — Inmate #1920602 — Loveleady, Texas 75851
Pro Se

APPELLEE: Lorie Davis, Director — Texas Department of
Respondent — Criminal Justice, Correctional
Institutional Division

LEAD ATTORNEY: Sarah Miranda Harp — P.O. Box 12548
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MAGISTRATE JUDGE: K. Nicole Mitchell — Eastern District of Texas
211 W. Ferguson St.
Tyler, Texas 75702

DISTRICT JUDGE: Ron Clark — 300 Willow St. Ste 104
Beaumont, Texas 77701-2217

UNITED STATES CIRCUIT JUDGE: Andrew S. Oldham
Eastern District of Texas
211 W. Ferguson St.
Tyler, Texas 75702

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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 judgements below.

OPINIONS BELOW

1. The decision of the United States Court of Appeals for the Fifth Circuit was March 20, 2019, in Appendix (A), and a timely filed Petitioner's Petition for Rehearing was denied by the United States Court of Appeals on the following date: May 2, 2019, and a copy of the order in Appendix (A) and the order denying rehearing appears at Appendix (D), designated as unpublished.

2. The District Court Order of Dismissa/Final Judgement appears at Appendix (B), in Appendix (C), the opinion of The United States District Court appears.

JURISDICTION

The judgement of The United States Court of Appeals for the Fifth Circuit was entered on March 20, 2019, Appendix (A), and a timely filed Petition for Rehearing was denied by the United States Court of Appeals on the following date: May 2, 2019, and a copy of the order denying rehearing appears at Appendix (d).

An extension of time to file the petition for a Writ of Certiorari was granted to and including September 29, 2019 on May 22, 2019 in Application No. 18A1208.

The jurisdiction of this Court is invoked under 28 U.S.C. § 2254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Amendment VI, to The United Statees Constitution, which provides:

AMENDMENT VI

The constitutional amendment, ratified with the Bill of Rights in 1791, guaranteeing in criminal cases the right to a speedy and public trial by jury, the right to be informed of the nature of the accusation, the right to confront witnesses, the right to counsel, and the right to compulsory process for obtaining favorable witnesses.

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

AMENDMENT XIV

The constitutional amendment, ratified in 1868, whose primary provisions effectively apply the Bill of Rights to the States from denying due process and equal protection and from abridging the privileges and immunities of U.S. citizenship.

STATEMENT OF THE CASE

Herron Kent Duckett, (Petitioner) was convicted and sentenced to fourty (40) years in prison for evading with a vehicle in violation of TEXAS PENAL CODE § 38.04. His conviction was affirmed on direct appeal, and his petition for discretionary review was denied. Duckett, proceeding pro se, initiated state habeas proceedings, the Texas Court of Criminal Appeals denied Duckett's petiton without hearing or written order.

Again proceeding pro se, Duckett sought federal habeas relief under 28 U.S.C. § 2254, claiming, among other things, ineffective assistance of counsel, both trial and appellate. The District Court denied Duckett's habeas petition and, sua sponte, denied Duckett a Certificate of Appealability (COA). Appendix (B)

Duckett timelv filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit but was denied a COA. Appendix (A)

REASONS FOR GRANTING THE PETITION

I

Compelling and fundamental reasons exist for the exercise of the Court's discretionary jurisdiction. The United States Court of Appeals, Eastern District of Texas, Tyler Division, has entered a decision in conflict with the decision of The Supreme Court of the United States concerning ineffective assistance of trial counsel under **Strickland v. Washington**,- 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Petitioner's Trial Atorney was clearly ineffective in his representation. He neglected to properly investigate and prepare for trial. He relied solely on the reports in the States' file and statement of Petitioner's girlfriend at the time, whom called the police on him. See **(Affidavit of Rick Hagan)**

He never investigated the allegations of the vehicle needing repairs and being incapable of reaching speeds beyond 75 m.p.h. (Speed limit was 75 m.p.h. at the time, 3 A.M. of the evading) had Trial Counsel proven this, the State would not have been abel to include a deadly weapon and the Trial Judge could haave included a lesser included.

Trial Counsel also committed a structural error and was defective for using the wrong statute when asking Trial Judge for a lesser-included offense. Petitioner's Trial Counsel violated his Sixth and Fourteenth Amendments by allowing a juror to sit on Petit Jury that has relatives, son and brother that are law enforcement officers. See Reporter's Record (R.R.) Vol. 2 Jury Voir Dire by Mr. Hagan pg. 109 lines 21-25, pg. 110 lines 1-4. This egregious error denied Petitioner a fair

and impartial jury.

Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639 (1961); **United States v. Frost**, 125 F3d 346, 379 (6th Cir. 1997) (citing **Ross v. Oklahoma**, 487 U.S. 81, 85, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988). Criminal Defendants have a Sixth Amendment Right to be tried by impartial and unbiased jurors.

II

Petitioner has a Batson Claim. Petitioner believes his Appeal Attorney was defective for failing to challenge the Batson Challenge on Direct Appeal.

Compelling reasons exist for the exercise of the Court's discretionary jurisdiction. The United States Court of Appeals Eastern District of Texas, Tyler Division, has entered a decision in conflict with the decision of The Supreme Court concerning the Batson Challenge, **Batson v. Kentucky**, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69, and it's rules in reviewing Trial Court's finding of no discrimination in exercise of peremptory challenges.

According to **U.S.C.A. Const. Amend. 14; Vernon's Ann. Texas C.C.P. Art. 35.261.**

When Appellate Court reviews Trial Court's finding of no discrimination in exercise of premptory challenges, it must review entire record, including vior dire and Batson Hearing.

Appellate Court may reverse Trial Court's denial of Batson Challenge if review of voir dire record, State's explanations, composition of jury panel, and Defendant's rebuttal and

impeachment evidence leaves Appellate Court with definite and firm conviction that a mistake has been made.

Petitioner showed potential errors committed to the Appellate Court that went undressed. During Petitioner's criminal trial for evading arrest with a vehicle, the Trial Judgeconducted voir dire examination of the jury venire and excused certain black jurors for cause. The Prosecutor then used his Premptory Challenges to strike the remaining black persons on the venire with the exception of one (1), whom has relatives, brother and son, that are law enforcement officers. All law enforcement officers testified against Petitioner during guilt phase of trial. The jury consisted of 10 whites, 1 hispanic and 1 africian-american.

Defense Counsel moved to discharge the jury on the grounds that the Prosecutor's removal of the black venire persons violated accused rights under the Sixth and Fourteenth Amendments to a jury drawn from a fair cross section of the community. Under reviewing of the Batson Challenge, Appellate Court should have discovered Petitioner did not have a fair and impartial jury. **Virgil v. Dretke**, 446 F3d 598 (5th Cir. 2006), **Quintero v. Bell**, 256 F3d 409, 413-15 (6th Cir. 2001), holding that Counsel's failure to object on jury-bias grounds created a structural error that was per se prejudicial under **United States v. Cronic**, 446, U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). Petitioner's Attorney applied wrong statute when asking Trial Judge to include lesser-included offense. See Reporter's Record (R.R.)

Vol. 3 - Day 1, pg. 175 lines 11-25, pg. 176 lines 1-25, pg. 177 lines 1-19.

Trial Attorney asked for evading on foot instead of evading with a vehicle, state jail felony, causing harm to Petitioner because the Trial Judge denied a lesser-included and left the jury with the sole option of either convicting the Defendant of the charged offense or acquitting him. **Almanza v. State**, 686 S.W.2d 157, 171. The Texas Court of Criminal Appeals has held that when the jury "is not allowed to consider the lesser-included offense in conjunction with the charge," Appellant is clearly harmed. Also **Cuyler v Sullivan**, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); **Ex Parte Cruz**, 739 S.W.2d 53, Attorney was in effective for not knowing applicable law pertaining to lesser-included offenses.

Allegations of ineffective counsel is firmly founded and the record affirmatively demonstrates counsel's alleged ineffectiveness.

III

Compelling and fundamental reasons exist for the exercise of the Court's discretionary jurisdiction. The United States Court of Appeals, Eastern District of Texas, Tyler Division, has entered a decision that is contrary to the ruling of the Supreme Court of the United States concerning deadly weapon findings in the Judgement of Convictions. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

In determining whether the evidence is legally sufficient

to support a deadly weapon finding, a reviewing court must consider all of the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences there from, a rational factfinder could have found the essential elements of the crime beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); **Brooks v. State**, 323 S.W.3d 893, 912 (Tex.Crim.App. 2010). Under this standard, evidence is insufficient to support a conviction if considering all record evidence in the light most favorable to the verdict, a factfinder could not have rationally found that each essential element of the charged offense was proven beyond a reasonable doubt. See **Jackson**, 443 U.S. at 319; in re **Winship**, 397 U.S. 358, 361, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); **Brooks**, 323 S.W.3d at 899; **Laster v State**, 275 S.W.3d 512, 517 (Tex.Crim.App. 2009). Evidence is insufficient under this standard in four circumstances:

1) The record contains no evidence probative to an element of the offense;

2) The Record contains a mere "modicum" of evidence probative of an element of the offense;

3) The evidence conclusively establishes a reasonable doubt; and

4) The acts alleged do not constitute the criminal offense charged. **Jackson**, 443 U.S. at 314, 318n. 11, 320; **Laster**, 275 S.W.3d at 518.

This standard leaves full play to the responsibility of the factfinder to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. **Jackson**, 443 U.S. at 319;

AnAn appellate court determines whether the necessary inferences are reasonable upon the combined and cumulative force of all the evidence viewed in the light most favorable to the verdict. **Clayton v. state**, 235 S.W.3d 772, 778 (Tex. Crim.App. 2007) quoting **Hooper v. State**, 214 S.W.3d 9, 16-17 (Tex.CrimApp. 2007). When the record supports conflicting inferences, the jury is presumed to have resolved the conflicts in favor of the verdict and defer to that determination. **Jackson**, 443 U.S. at 326.

A reviewing court does not reweigh the evidence from reading a cold record but to act as a "due process safeguard ensuring only the rationality of the factfinder." **Williams v. State**, 937 S.W.2d 479, 483 (Tex.Crim.App. 1996) quoting **Matamoros v. State**, 901 S.W.2d 470, 474 (Tex.Crim.App. 1995) because no one died or actually suffered serious bodily injury, the narrow issue in this case is whether any rational jury could have found Petitioner used a weapon (vehicle) in such a way that the weapon could be capable of causing death or serious bodily injury.

"To sustain a deadly weapon finding requires evidence that others were endangered, and not merely a hypothetical potential for danger if others had been present." **Mann v. State**, 13 S.W.3d 89, 92 (Tex. App. - Austin 2000), aff'd 58 S.W.3d 132.

Drichas v. State, 152 S.W.3d 630 (Tex.App. - Texarkana, 2004 pet. granted) court once again held that the evidence was insufficient to establish that the Defendant used his vehicle as a deadly weapon while attempting to evade pursuing officers. Also **Drichas v. State**, 219 S.w.3d 471 (Tex.App. - Texarkana, 2006 pet. ref'd.)

In **Drichas v. State**, Defendant was speeding, weaving in and out of lanes, skidding around corners, disregarding oncoming traffic, drove on wrong side of road towards oncoming traffic, drove erratically while leading officers on a fifteen (15) mile chase, crossing state lines into Texas from Arkansas. Drove through downtown Texarkana, Texas. Turned into a mobile home park, exitteeed the vehicle and ran into nearby woods. The vehicle collided with a parked van, causing the van to collide with a mobile home.

In Petitioner's case, no officer testified to any severe personal danger or possible endangerment to any third person. No witness gave an opinion that the observed operation of the jeep made that vehicle capable of causing death or serious bodily injury.

There is no evidence at all in the record about erratic swerving into oncoming traffic, loss of control of vehicle, disregarding traffic signs, and any actions that jeopardized anyone else on the road at 3 A.M. There is no evidence that Petitioner was intoxicated, or impaired by any substance while driving.

Burt, a Longview Police Officer (LPD) testified that driving conditions during the chase were clear, the pavment dry. Traffic was light. He also testified that his video camara did not turn on putting doubt in his testimony.

LPD Officer Montgomery who was behind Officer Burt whose camara showed the alleged evading stated he was atleast one hundred (100) yards behind the Petitioner.

A deadly weapon finding is a fact-specific inquiry, and the mere "modicum" of facts in this case do not support such a finding.

Please take notice that both the Magistrate Judge and District Judge, Eastern District of Texas, Tyler Division, has misquoted Petitioner's evidence in there facts and recommendation, placing **Drichas v. State** evidence in place of his.

CONCLUSION

Wherefore Now, Mr. Herron K. Duckett urges this Honorable Court to issue a Writ of Certiorari.

Respectfully Submitted,

_____

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_____, 2019