No. 19-5786

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Fifth Circuit

Joshua George Nowland — PETITIONER
(Your Name)

vs.

Lorie Davis, Director TDCJ — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. District Court for the Eastern District of Texas Beaumont Division
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Joshua George Nowland
(Your Name)

1675 S. FM 3525
(Address)

Colorado City, TX 79512
(City, State, Zip Code)

325-728-2162
(Phone Number)

QUESTION(S) PRESENTED

1) Is oppressive pretrial incarceration still an important part of the Barker balancing test for Speedy Trial?

2) Is it accepted practice for Federal Judges to skip over prongs of the Barker analysis when judging a constitutional violation of the right to a Speedy Trial?

3) Is it Constitutional for the State Court to deny alleged violations of Constitutional Rights without reviewing them?

4) Has Barker v Wingo been overturned so that now an affirmative demonstration of prejudice is necessary to prove a denial of the Constitutional right to a speedy trial?

LIST OF PARTIES

[X] 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:

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STATUTES AND RULES

OTHER

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 A to the petition and is

[■] reported at 18-41049; 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[ ] is unpublished.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 B to the petition and is

[■] reported at 1:15cv273 MAC-ZJH; 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[ ] is unpublished.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 _____ 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[ ] is unpublished.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 July 18, 2019.

☒ 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 _____. 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

Violations of 5th, 6th and 14th Amendments primarily dealing with the Right to a Speedy Trial.

Amendment V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation 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 criminal case to be a witness against himself, nor to be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI: 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 accusation; to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV

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

I was arrested on May 9th, 2012 and was not arraigned or tried until July 8th, 2013 approximately 14 months after my arrest. I was worried that they would never bring me to trial and so I filed multiple motions of discovery and speedy trial pro-se because my lawyer Carolyne Wiedenfeld refused to turn in my motions to the court.

During the trial, all of the witnesses had difficulties remembering. Randal Flatau the main prosecution ~~whit~~ witness whose testimony was used to authenticate the majority of the evidence later admitted that he was not present and could not in fact authenticate the majority of the evidence.

Some of the other witnesses memories where so impaired that even looking at their earlier witness statements didn't help to refresh their memory.

Of the thirteen surveilance videos, none of which I was ever allowed to see until the trial, four of them where either blank or too blurry to be usefull. One of these damaged videos was the only one from the inside of the store.

After the trial my habeas petition was never adjudicated on its merits in State Court. It was denied without written order but none of the merits of my habeas petition where ever taken into consideration.

During my Federal Habeas petition the State of Texas conceeded that the length of delay was long enough to trigger a speedy trial inquiry. They also did not contest my assertion of oppressive pretrial incarceration and anxiety and concern.

Judge Hawthorn the Federal Judge assigned to my case skipped over oppressive pretrial incarceration and anxiety and concern, while weighing my case. He then misquoted a case law and used this misquotation to justify his denial of my appeal.

This was allowed to stand by subsegent Federal Appeals courts.

REASONS FOR GRANTING THE PETITION

A) A United States Court of appeals has entered a decision that has so far departed from the accepted and usual course of judicial proceeding or sanctioned such a departure by a lower court as to call for an exercise of this court's supervisory power.

C) This US Court of appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court.

To determine whether a defendant was denied his right to a speedy trial, four factors are considered.

1) length of delay
2) reason for delay
3) defendant's diligence in asserting his rights
4) Prejudice to defendant caused by delay.

Barker v Wingo 407 US 514, 530

The fourth factor, prejudice to the defendant consists of 3 parts
1) to prevent oppressive pretrial incarceration
2) to minimize anxiety and concern of the accused
3) to limit the possibility that the defense will be impaired.

Of the four Barker factors the magistrate judge concluded the first three factors weighed in my favor. Of the fourth factor which is divided into three parts. The State has conceeded the first two, oppressive pretrial incarceration and anxiety and concern of the accused but the District Court has never addressed these claims.

The Federal Court then went on to misquote Divers v Cain 698 F3d 211, 219. Then use this misquotation to deny my appeal.

Judge Hawthorn the Federal District judge quoted Divers v Cain as saying

"Under the fourth Barker prong, unless the first three factors weigh heavily in favor of defendant or the delay is at least five years, the burden is on petitioner to put forth evidence of actual prejudice."

I had thought that the district court judge was taking this quote out of context but when I looked up the case I found that the case is real. It even deals with Speedy Trial and page 219 is the part where they deal with prejudice to the defense but this quote is nowhere to be found.

The Federal Court of Beaumont Texas said that I would need to prove an affirmative demonstration that I was harmed.

This is directly countered by prior Supreme Court cases. In Moore v Arizona 94 S.Ct 188 the Court states "The State Court was in fundamental error in its reading of Barker v Wingo and in the standard applied in judging petitioners speedy trial claim. Barker v Wingo expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the Constitutional right to a speedy trial."

In Smith v Hooey 393US374; 89 S.Ct 575, 580 the Supreme Court states "if petitioner makes a prima facie showing that he was in fact been prejudiced by the State's delay. I would then shift to the State the burden of proving the contrary."

" With regards to the State of Texas not contesting my assertions of oppressive pretrial incarceration and anxiety and concern the Supreme Court states In Doggett, if "the presumption of prejudice, a belf unspecified, is neither extennated, as by the defendants acquiecence, nor persuasively rebutted, then the defendant is entitled to relief." Doggett 505 at 658 and 112 S.Ct at 2694.

Palacios v State 225 SW3d162

"When a defendant claiming a speedy trial violation makes a prima facie showing of prejudice from delay the burden shifts to the State to show that the defendant suffered no serious prejudice beyond what ensued from the ordinary and inevitable delay.

USCA Const Amend 6, 14; Vernons Am Texas Const Art 1 §10"

"The Sixth Amendment right to a speedy trial is thus not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the due process clause and by the statutes of limitations.

The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial ... and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges."

US v MacDonald 102 S.Ct 1502

The Right to a speedy Trial is one of the Rights spelled out in the Original Bill of Rights. This right goes back to the Magna Carta (1215) and our English common law heritage. Klopfer v N. Carolina 87 S. Ct 993

This is not a Right that can just be skipped over if it is inconvinent for the judge or prosecutor.

The State of Texas has been flouting the Constitution of the United States and the Beaumont Division Court has helped them in this regard.

If this decision is allowed to stand then other speedy trial plaintiffs could also have the bar of evidence substantially raised for them, making the safeguards and rights of the 6th Amendment not worth the parchment it is printed on.

Judge Hawthorn made two fundamental errors when he judged the prejudice to defense prong of the Barker analysis. He completely skipped over the first two prongs of oppressive pretrial incarceration and anxiety & concern.

Then Hawthorn misquoted Divers v Cash and used this "misquotation" to fundamentally distort the Speedy Trial right essentially striping that right from the Constitution.

If Hawthorn's interpretation of the Speedy Trial Right is allowed to stand then prosecutors could hold anyone accused of a crime for up to 5 years. They wouldn't even need to be brought up on charges and our judicial system and Constitutional Rights will become essentially worthless.

If that isn't enough to take on my case then you could debate which is more important oppressive pretrial incarceration which MacDonald espouses or impairment to the defense which Barker v Wingo prefers.

In which case I should expand on this.

I was incarcerated from the 9th of May 2012 until my trial on the 9th of July 2013 approximately 14 months. For the first three of those months I was in solitary confinement without access to natural light, recreation or the law library. The lights where turned on or off for days at a time I became depressed from the lack of sun light. I contend this was a deliberate attempt by the district attorney to break me and force me to take a plea. Which the State of Texas does not contend and concedes these claims.

Of the 13 videos, only 3 of which I was allowed to see during the trial, 4 of them where either blank or too blurry to see.

One of these damaged videos was the only one from inside the store. It could have been used to show the store owner and his wife shooting me after I surrendered as I lay on the ground with my hands on my head. It would have also shown who moved the bag of jewlery from inside the store to the outside.

During the trial multiple witnesses had difficulties remembering. Randal Flatau the main prosecution witness suffered the most memory loss. His critical testimony was used by the prosecution to admit the first 58 items into evidence. The vast majority of the evidence. The prosecution asked Mr. Flatau if the photos where familiar to him (R.R. III 33). If the images fairly reflected the condition of the store and if anything had been altered (RR III 34). He replied in the affirmative. He later testified that he was not present when the photos where taken (RR III 35-36). That items had been added (RR III 37). He didn't know what some of the items depicted where (RR III 39). That some of the evidence had been altered and moved (RR III 42).

He needed to look at his previous statements to refresh his memory (RR III 64) before admiting that the defendant had offered him an "envelope with money in it." (RR III 69). He stated "It appeared to be a bank envelope with money" (RR III 70).

Prejudice to Defence.

Randal Flatau again stated at trial that he had never seen Exhibit #9 (RR III 74-75) after his testimony was used to admit the evidence to court. He repeatedly said that he had never seen it before after his testimony was used to admit 58 items, the vast majority of the evidence into evidence.

He went on to state that he had never seen items depicted in the photographs (RR III 76) and that the photographs were "foreign" to him. He again stated repeatedly that he didn't remember (RR III 77) before admitting that nothing was missing from the store.

Theresa Flatau

Theresa Flatau stated that she had memory problems also (RR III 104) before saying that my shooting of Mr. Flatau was an "accident." She then reiterated that she didn't remember (RR III 104).

Donna Rizzotto

Donna Rizzotto also had memory problems. Her memory was so impaired that even looking at her earlier witness statement didn't help to refresh her memory (RR III 117).

Officer Jarrett Pantallion

Officer Pantallion also had difficulty remembering. He needed to refer repeatedly to his report to refresh his memory (RR III 123-124). He needed to read directly from the report (RR III 124) after being admonished by the court not to read from the report (RR III 124).

[illegible] never had

"The Supreme Court explicitly held that such dismissal is mandated upon a determination that an accused's Sixth Amendment Speedy Trial Right was violated."

Strunk v US 93 S.Ct 2260

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Joshua Nowland

Date: 20 August 2019