

19-5824
No. _____

ORIGINAL

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S IN THE
SUPREME COURT OF THE UNITED STATES

WILLIAM A. KENNEDY, PETITIONER

V.

LORIE DAVIS, DIRECTOR
TEXAS DEPT. OF CRIMINAL JUSTICE
CORRECTIONAL INSTITUTIONS DIVISION
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
U UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

P PETITION FOR WRIT OF CERTIORARI

William A. Kennedy, 'pro se'

T.D.C.J. ID# 1740869

Allred unit-T.D.C.J.

2101 F.M. 369 N.

Iowa Park, Texas

76367

QUESTIONS PRESENTED

1. Did the U.S. Court of Appeals for the Fifth Circuit err in its denial of a certificate of appealability to review the U.S. District Court's denial of habeus relief for the petitioner-appellant?
2. Does the State of Texas' statute regarding "deadly weapons" and its application in criminal prosecutions violate Due Process allowing arbitrary prosecutions?
3. Are a person's bare hands legally sufficient "deadly weapons"?
4. What is the threshold for deficient counsel to overcome a procedural default precluding review of the merits in claims seeking habeus relief?
5. Can appellate courts review claims not expressly stated in original petitions for habeus relief that are closely related to claims contained in the original petition?

LIST OF PARTIES

1. William A. Kennedy, petitioner-appellant
2. Lorie Davis, director of the Texas Department of Criminal Justice, Correctional Institutions Division
respondent-appellee

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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

1. The order denying the issuance of a certificate of appealability by the United States Court of Appeals for the Fifth Circuit appears in APPENDIX A. Petitioner is not aware if said order was published.
2. The opinion of the United States district court for the Northern District of Texas-Fort Worth Division denying habeus relief and a certificate of appealability is found in APPENDIX B. Petitioner is not aware if said opinion was published.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit denied the petitioner's application for a certificate of appealability on April 9, 2019, and there was not a request for a rehearing made to the circuit court.

An extension of time to file this petition for a writ of certiorari was granted to and including September 6, 2019, on June 5, 2019, in APPLICATION No. 18A1270.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment of the Constitution of the United States.
2. The Sixth Amendment of the Constitution of the United States.
3. The Fourteenth Amendment of the Constitution of the United States.
4. 28 U.S.C. § 2253(c)(2)
5. FEDERAL RULES OF APPELLATE PROCEDURE, Rule 22(b).

STATEMENT OF THE CASE

This petition stems from the denial of habeus relief sought by the petitioner-appellant, William A. Kennedy (referred to herein as "Kennedy"). Kennedy was convicted in a Tarrant Co., Texas court of "Aggravated Robbery with a deadly weapon" which is a 1st degree felony on September 14, 2011, and Kennedy received a "life" sentence which will require him to serve 30 years day-for-day before he is even eligible for parole. Kennedy has challenged several aspects of his conviction on both direct appeal and collateral review to no avail, so far.

Kennedy is a drug addict with a history of mental health problems, and his substance abuse problem has caused him to become a petty thief and criminal. Kennedy has been in and out of jail since 1990 for various offenses such as theft and drug possession, and there is one conviction for felony assault that involved a fight with another drug-addled, convicted felon in 2002. Kennedy's current sentence is the only time he has ever received anything longer than an 8-year prison term.

In June of 2010, Kennedy had relapsed again into the depths of cocaine addiction and alcoholism, and he reverted back to being a petty thief to support his addiction which involved "serial" shop-lifting from stores such as Walmart and Target. Kennedy's 'modus operandi' was to enter a store like any customer and pick up an item he wanted to steal. Then he would carry the item to the "lawn & garden" dept. of the store as if he was shopping. Kennedy's car would be parked outside one of the emergency exit doors of the "lawn & garden" dept. If Kennedy was able to walk unobserved to the emergency door he would leave the store through that door and get in his car and drive away. In the past, Kennedy

knew that by the time any store employee heard the alarm sound because the emergency exit door was opened and went to investigate he would be driving away a block or two down the road. Kennedy had always avoided any confrontations with store employees, and many times in the past Kennedy would abandon a theft-attempt because a store employee had ~~stopped~~^{stopped} to question Kennedy as he was walking in the store carrying merchandise he wanted to steal. Unfortunately, on June 11, 2010, things turned out much differently than what Kennedy had previously experienced or intended.

On that day as Kennedy was carrying a small boxed television from the "electronics" dept. of a Fort Worth, Texas-area Walmart to the "lawn & garden" dept. of the store, a store employee named Bruce Florence was working in the "lawn & garden"^{dept.} and noticed Kennedy carrying the small boxed television into the "lawn & garden" dept. Mr. Florence approached Kennedy inside the store in the main aisle of the area approximately 20 feet before the check-out counter and regular exit doors. Mr. Florence walked up to Kennedy from the check-out ~~counter~~^{counter} and met Kennedy in the main aisle and asked Kennedy if he needed any help. Kennedy told Mr. Florence that he was in that part of the store looking for someone. Kennedy attempted to step to his left down an aisle of merchandise, but Mr. Florence stepped in front of Kennedy to prevent Kennedy from walking that way. Then Kennedy stepped back to avoid contact with Mr. Florence as Mr. Florence reached forward in an effort to take the small boxed television out of Kennedy's hand. This action startled Kennedy because he knew that he had not violated any laws to that point, so as Mr. Florence reached forward to take the television Kennedy let the television drop to the ground and then used his bare hand in a single, open-

handed push to the chest of Mr. Florence in order to give them separation to allow Kennedy to run out of the store. Kennedy did not attempt to pick up the television from the ground and steal it, nor did Kennedy strike or assault Mr. Florence other than the single push with his bare hand. The push did cause Mr. Florence to lose his balance and fall backwards causing him to hit his head on the floor. The ~~police~~^{police} and an ambulance were called to the store, and Mr. Florence was taken to a local hospital for examination. An x-ray was done at the hospital, and it showed a small fracture to Mr. Florence's skull. Mr. Florence was kept in the hospital for observations, and after several days his condition became worse. After nine days transpired, Mr. Florence passed away. Right after Mr. Florence's death, his widow, daughter, and the investigating police detective made several interviews with the local media and blamed Kennedy for causing Mr. Florence's death. Kennedy had been arrested about 6 days prior to Mr. Florence's death for the shop-lifting attempt and was charged with the 1st degree felony of "Aggravated Robbery causing serious bodily injury". After Mr. Florence's death various people pressured the Tarrant Co. District Attorney to charge Kennedy with the murder of Mr. Florence, but the D.A. needed to have the autopsy results show the cause of death to be "homicide" before Kennedy could be charged with the murder of Mr. Florence. The Tarrant Co. Medical Examiner took nearly two months to release the autopsy results, and during that time this incident made national news with headlines such as "Walmart employee killed by shop-lifter" and so on. Much to many people's disappointment, the autopsy showed that Mr. Florence died of liver failure due to a chronic hepatitis C infection that he

had suffered from for many years. In fact, Mr. Florence had been on a liver-transplant waiting list. The medical examiner's report stated that the head injury Mr. Florence suffered in the fall during the shop-lifiting attempt was "minor" and did not contribute to Mr. Florence's death in any way at all, so the D.A. was unable to charge Kennedy with Mr. Florence's murder. The medical examiner testified to all this during Kennedy's trial and can be reviewed in the record in APPENDIX F. As stated previously, Kennedy was initially charged with the 1st degree felony of "Aggravated Robbery causing serious bodily injury". (See APPENDIX F for the police report filed 5 days after the incident) Please note that in that report there was never any charge or accusation that Kennedy used a "deadly weapon" in the shop-lifting attempt. After the medical examiner's autopsy report was released with the conclusion that Mr. Florence's head injury sustained during the theft-attempt was legally classified as "minor" and not contributing to Mr. Florence's death in any way the D.A. realized they would not be able to prove the "serious bodily injury" aspect of Kennedy's charge, so they decided to charge Kennedy with using a "deadly weapon" during the theft-attempt, to make the charge 1st degree felony of "Aggravated Robbery with a deadly weapon", claiming that his bare hand in the single, open-handed push and/or the boxed television was the "deadly weapon" even though the store surveillance video clearly showed that Kennedy never struck Mr. Florence with the boxed television. The "deadly weapon" accusation did not materialize until Kennedy was indicted approximately 3 months after the incident and about 2 months after the medical examiner released the autopsy results. If there was legitimate evidence that Kennedy used a "deadly weapon", why WAS

there no mention of a "deadly weapon" in the police report filed 5 days after the theft-attempt occurred? This shows that the D.A. was cognizant of the public and media's perception of this incident and wanted to "make an example" out of Kennedy and put on a "show" for the media and public.

Kennedy was unable to afford counsel, so counsel was appointed. It is Kennedy's belief that the appointed counsel had little or no trial experience especially in serious felony jury trials, so the court-appointed attorney went to the trial judge and got funds to hire his friend as co-counsel. It should be noted that Kennedy never spoke to this co-counsel until the day of jury selection, ^{Kennedy} and questions just how prepared this attorney was to represent Kennedy. To be succinct, the job done by Kennedy's two court-appointed attorneys was woefully inadequate. The trial record on the 'guilt/innocence' stage of Kennedy's trial is contained in full in APPENDIX F, ^{Kennedy} and sincerely hopes that someone would read through it to note how poorly his trial counsel performed.

Kennedy believed that the more appropriate charge for what he actually did was "Robbery" which is a 2nd degree felony with considerably less time required to serve before parole-eligibility even with a "life" sentence for that charge which would have been about 8 years day-for-day as opposed to 30 years day-for-day on "Aggravated Robbery with a deadly weapon". Kennedy offered to take a 15-year sentence for "Robbery" hoping to negotiate a reasonable plea-agreement, but the only plea offer by the D.A. was 50-years for "Aggravated Robbery with a deadly weapon" which Kennedy believed was too harsh and not fair because he did not ever use a "deadly weapon" during the theft-attempt. Without there being any plea-agreement, the jury trial occurred.

The jury found Kennedy guilty of the 1st degree felony of "Aggravated Robbery with a deadly weapon" without even specifying whether they found his hand or the boxed television as the "deadly weapon". The trial court judge sentenced Kennedy to "life" requiring him to serve 30-years day-for-day before parole-eligibility.

The trial court judge appointed different counsel to represent Kennedy on appeal, and to Kennedy's knowledge the appointed appellate counsel failed to file a meaningful motion for a new trial or anything else. After Kennedy's mother witnessed what Kennedy had gone through with the terrible representation with the court-appointed attorneys, she hired counsel to represent Kennedy on direct appeal. Kennedy's direct appeal was denied in 2013 [See Kennedy v. State, 402 S.W. 3d 796 (Tex. App.-Fort Worth²⁰¹³) for the opinion]; although, one of the three judges on the panel dissented regarding the constitutionality of the "deadly weapon" finding without any proof that Kennedy knew he was employing a "deadly weapon" during the theft-attempt. Kennedy's appellate counsel learned that the state appellate court denied Kennedy's direct appeal challenging the legal sufficiency of the evidence regarding the "deadly weapon" finding without the panel bothering to review the prosecution's chief piece of evidence exhibited during the trial which was the store surveillance video that clearly showed the theft-attempt. (See APPENDIX D for proof that the appellate court denied Kennedy's appeal without even reviewing the evidence) The state appellate court tacitly acknowledged they came to their conclusion without reviewing the video because Kennedy's appellate counsel filed a motion to supplement the record with the video which the appellate court granted which they would not have done had the video already been part of the

record and been reviewed prior to their decision to deny Kennedy's appeal. Then, inexplicably, the appellate court denied Kennedy's motion for a rehearing. (See APPENDIX D) How can an appellate court make an informed and just decision in a case where a defendant received a "life" sentence for a 1st degree felony without bothering to review the chief piece of evidence exhibited during the trial which clearly showed the shop-lifting attempt which would have helped it come to the correct decision regarding any alleged use of a "deadly weapon" when one of the points of Kennedy's appeal challenged the sufficiency of the evidence regarding the "deadly weapon" finding by the jury?

After the state appellate court denied Kennedy's motion for a rehearing with the video available to ^{be} reviewed, Kennedy's appellate counsel filed a Petition For Discretionary Review with the state's highest criminal court as the final step in Texas' criminal conviction direct appeal process which was denied without written order. (See APPENDIX E) It is the practice of the federal courts when reviewing state court decisions to adopt the "look-through" doctrine when there is no written order by an appellate court in its review of a lower court decision, so one must assume the Texas Court of Criminal Appeals determined that Kennedy's use of his bare hand in pushing Mr. Florence was sufficient to support the "deadly weapon" finding in accordance with the written opinion in Kennedy's direct appeal by the Texas 2nd Court of Appeals. This is important to note because the Texas 13th Court of Appeals came to the exact opposite conclusion in regards to a defendant's bare hands being legally sufficient as "deadly weapons" in Davis v. State, 533 S.W. 3d 498 (Tex.App.-Corpus Christi/Edinburg 2017),

In Davis, id., the state filed a Petition For Discretionary Review seeking to overturn the lower court's order, and the Texas Court of Criminal Appeals refused the state's petition. So, here we have two Texas appellate courts coming to the exact opposite conclusion regarding bare hands being legally sufficient "deadly weapons" according to the Texas statute in the Texas Penal Code §1.07 which covers "deadly weapons", and in both cases Texas' highest criminal court refused to review those decisions which ~~means~~ ~~means~~ that they are showing no consistency in their approach.

Once the Texas Court of Criminal Appeals denied Kennedy's Petition For Discretionary Review, Kennedy filed a 'pro se' Petition For Writ OF Certiorari with this Court in case no. 13-10784. This Court did not simply refuse Kennedy's petition, but requested a response from the State of Texas before ultimately denying Kennedy's petition which gives Kennedy hope that some of the Justices found some merit to Kennedy's claims.

Once this Court denied Kennedy's 'pro se' petition as Kennedy's last step in his direct appeal process, Kennedy's mother hired counsel to represent Kennedy in his collateral attack of his conviction. (See APPENDICES B and C) Kennedy's habeas counsel challenged the constitutionality of the "deadly weapon" aspect of Kennedy's conviction in two different ways along with other issues. The Texas Court of Criminal Appeals denied Kennedy's state application for writ of habeas corpus without written order in 2016 (See APPENDIX C), but it should be noted that one of Texas Court of Criminal Appeals judges, the Hon. Alcalá, dissented stating she would have agreed to set Kennedy's case for further proceedings. So, there were two separate state appellate judges who reviewed Kennedy's case dissenting against the majority denying

relief for Kennedy.

Once Kennedy exhausted his state proceedings for habeus relief, his counsel filed a Petition For Writ Of Habeus Corpus in the U.S. District Court for the Northern District of Texas-Fort Worth Division. (See APPENDIX B) The district court applied the "look-through" doctrine and deferred to the Texas 2nd Court of Appeals ruling against Kennedy regarding the sufficiency of the evidence regarding the "deadly weapon" finding although that was an erroneous decision as previously expounded upon. The district court also denied relief on the other issues in Kennedy's petition and denied a Certificate Of Appealability. Kennedy's mother was unable to afford counsel for Kennedy any longer, so Kennedy filed his application for a C.O.A. in the U.S. Court of Appeals for the Fifth Circuit as a 'pro se', indigent prisoner in July of 2018. (See APPENDIX A) Kennedy's application for a C.O.A. was denied on April 19, 2019. Kennedy did not seek a rehearing in the U.S. Court of Appeals. Rather, he chose to petition this Court for a Writ of Certiorari to review the U.S. Court of Appeals for the Fifth Circuit denial of a C.O.A. Kennedy sought an extension of time to file his application, and Justice Alito graciously granted Kennedy an extension to the filing deadline to September 6, 2019. (See Appendix A)

REASONS FOR GRANTING THE PETITION

This Court should grant Kennedy's petition because the U.S. Court of Appeals for the Fifth Circuit did not follow the law set forth in 28 U.S.C. § 2253(c)(2) which states,

"A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right..."

Kennedy made a substantial showing of the denial of his constitutional rights under the Fifth and Sixth Amendments of the Constitution of the United States as applied to state prisoners under the Fourteenth Amendment throughout his direct appeal and collateral attack of his conviction for the 1st degree felony of "Aggravated Robbery with a deadly weapon". (See APPENDICES A through E) Furthermore, the Federal Rules of Appellate Procedure in Rule 22(b) states,

"...If the district judge has denied the certificate, the applicant may request a circuit judge to issue it."

Kennedy showed sufficient cause in ^{his} C.O.A. application brief to the U.S. Court of Appeals. (See APPENDIX A) This Court set the standards for the issuance of a C.O.A. in Miller-El v. Cockrell, 123 S.Ct. 1029 (2003), Buck v. Davis, 137 S.Ct. 759 (2017), and Slack v. McDaniel, 120 S.Ct. 1595 (2000). The circuit judge did not follow those standards in denying Kennedy's C.O.A.

This Court should consider that the issues Kennedy presented throughout his state and federal habeas proceeding have an effect on every person ever accused of using his bare hands as a "deadly weapon" by overly zealous prosecutors in arbitrary efforts to greatly enhance the charges and punishment a criminal defendant may face. In Kennedy's case, the Texas statutes governing criminal proceedings do not even require proof beyond a reasonable doubt

when convicting someone of using or exhibiting a "deadly weapon" which is an integral part of felony charges such as "Aggravated Assault" and "Aggravated Robbery" which would be different, lesser charges in Texas without the "deadly weapon" finding. The Texas law and criminal practice completely disregards the law established by this Court in In re Winship, 90 S.Ct. 1068 (1970) and Morissette v. United States, 72 S.Ct. 240 (1952). Please refer to Kennedy's brief presented to the U.S. District Court in his habeus petition found in APPENDIX B which Kennedy's attorney did a good job of detailing. Kennedy believes the Texas statute governing "deadly weapons" in Texas Penal Code §1.07 is overly broad ^{with} ~~on~~ its wording and application leading to arbitrary prosecutions and is possibly unconstitutionally vague which is an issue this Court has ruled upon in recent cases such as Elonis v. United States, 135 S.Ct. 2001 (2015) and Johnson v United States, 130 S.Ct. 1265 (2015).

The circuit judge should have issued a C.O.A. and reviewed the constitutionality of Texas "deadly weapon" statute and how it was applied to Kennedy's case specifically because in previous rulings the ^{5th} ~~9th~~ Circuit has considered claims on the merits when those claims were roughly presented to lower courts with the same general issues. [See Coleman v. Dretke, 396 F.3d 216 (5th Cir.2004) and Soffar v. Dretke, 368 F.3d 441 (5th Cir.2004)] The Fifth Circuit has also heard cases on the merits with issues first implied on appeal which were of such significance involving matters of "pure law". [See Delta-X v. Baker Hughes Production Tools, 984 F.2d 410 (Fed.Cir.1993) and McClellan v. Lone Star Gas, Co., 66 F.3d 98 (5th Cir. 1995)]

Kennedy made a substantial showing of the denial of constitutional rights in his petitions for writ of habeus corpus before

the state and federal courts regarding the sufficiency of the evidence claim where Kennedy was convicted of using a "deadly weapon" where the only factual evidence in both video and witness testimony introduced during the trial shows that Kennedy only pushed Mr. Florence one time in his chest with an open, bare hand that was the result of them practically running into each other during a theft-attempt which, although not completely accidental, was not intended on the part of Kennedy to hurt Mr. Florence in any way. Please refer to the trial record in APPENDIX F to verify that there is nothing in the record otherwise. APPENDICES A through E will show that Kennedy has adequately presented this claim before the lower state and federal courts with those courts denying Kennedy relief in contradiction to the facts in the record. Sufficiency of the evidence claims involve the Due Process Clause of the Fifth Amendment of the U.S. Constitution, and the seminal case law in this issue is Jackson v. Virginia, 99 S.Ct. 2781 (1979). No "rational trier of fact" would have found Kennedy guilty of using his bare hand as a "deadly weapon" had the prosecution been forced to prove Kennedy knew that by pushing Mr. Florence one time in the chest with a bare, open hand was, in fact, using a "deadly weapon", and no "rational trier of fact" would have found Kennedy mentally culpable of using a "deadly weapon" had his trial counsel performed adequately. Kennedy's trial was centered around the prosecution evoking sympathy from the jury for Mr. Florence and his family, and Kennedy's trial counsel should have done better at preventing such.

What is the difference between Kennedy's use of his hand during the theft-attempt and every single simple robbery or misdemeanor assault case ever prosecuted in the State of Texas

where someone pushed another person with their bare hand causing them to fall? The way the Texas statute is written allows for capricious and arbitrary prosecutions for alleged "deadly weapon" aspects of various charges in Texas.

Even the Texas appellate courts have ruled very differently with no consistency on "deadly weapon" findings ^{for bare hands,} and this is a fundamental miscarriage of justice to Kennedy and many other people prosecuted in Texas. The state appellate courts in Davis v. State, 533 S.W. 3d 498 (Tex.App.-Corpus Christi/Edinburg 2017), Rodriguez v. State, 31 S.W. 3d 772 (Tex.App.-Austin 2000), affirmed 104 S.W. 3d 87 (Tex.Crim.App.2003) and Johnston v. State, 115 S.W. 3d 761 (Tex.App.-Austin 2003) affirmed 145 S.W. 3d 215 (Tex.Crim.App.2004) ruled that bare hands are not legally sufficient "deadly weapons" and vacated those aspects of the appellants' convictions which is the exact opposite of what the Texas 2nd Court of Appeals ruled in Kennedy's case (See Kennedy, id.). Then, the Texas Criminal Court of Appeals actively affirmed the cases in Rodriguez, id. and Johnston, id. In Davis, id., the state filed for a Petition For Discretionary Review that the Texas Court of Criminal Appeals denied without written order as it did in the exact opposite circumstance in Kennedy's case, so it is apparent that Texas' highest criminal appellate court has shown no consistency in it's approach to this issue as well. The ruling by the Texas 2nd Court of Appeals in Kennedy, id. is the ruling that the U.S. District Court referred to in Kennedy's challenge to the sufficiency of the "deadly weapon" aspect of Kennedy's petition for habeas relief (See APPENDIX B)

In furtherance, the United States Court of Appeals for the Ninth Circuit ruled that a person's bare hands cannot be con-

strued as legally sufficient "dangerous weapons" in United States v. Rocha, 598 F.3d 1144 (9th Cir.2010), and the facts pertaining to how the defendant used his bare hands in ^{U.S. v. Rocha, id.} is very similar to how Kennedy used his bare hand in the theft-attempt. In ^{U.S. v. Rocha, id.} the court cited several cases from many states that have ruled the bare hands cannot be "dangerous or deadly weapons", and it is the majority of the states that have made such determinations. It is clear that it is debatable amongst "jurists of reason" as required by Miller-El v. Cockrell, id. that bare hands are not legally sufficient "deadly weapons", so the circuit judge should have issued a C.O.A. to consider the merits of Kennedy's claim presented to the district court. on the sufficiency of the evidence that Kennedy's bare hand was a legally sufficient "deadly weapon". The "deadly weapon" finding in Kennedy's case made Kennedy's conviction a 1st degree felony called "Aggravated Robbery" which is Texas Penal Code §29.03. Without the "deadly weapon" finding, Kennedy would have been convicted of the 2nd degree felony called "Robbery" found in Texas Penal Code §29.02. Even if Kennedy had received a "life" sentence for "Robbery" he would have been eligible for parole after serving about 8 years day-for-day as opposed to 30 years day-for-day on a "life" sentence for "Aggravated Robbery".

As previously stated, the district court deferred to the ruling by the Texas 2nd Court of Appeals in Kennedy's direct appeal (See Kennedy, id.) when it denied Kennedy habeus relief regarding his sufficiency of the evidence claim, but the Texas 2nd Court of Appeals opinion is erroneous and should not have been considered by the district court. The ruling is erroneous because the Texas 2nd Court

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of Appeals did not even bother to review the prosecution's chief piece of evidence exhibited during the trial which was the store surveillance video the clearly showed the theft-attempt before denying Kennedy's direct appeal. After the order and opinion was issued, Kennedy's appellate counsel learned that the state appellate court did not review the surveillance video evidence which clearly showed that Kennedy did not strike Mr. Florence with the boxed television or use the television in any conceivable manner as a "deadly weapon" and that the physical contact between Mr. Florence and Kennedy was very brief involving a single, open-handed push by Kennedy. The video would have helped the appellate court come to the proper conclusion that Kennedy did not use a "deadly weapon" in the theft-attempt, which Kennedy challenged in his sufficiency point of error in his direct appeal brief. It is unreasonable that an appellate court would decide a case without even bothering to review the prosecution's chief piece of evidence exhibited at trial where the defendant received a "life" sentence for a 1st degree felony. The proof of this can be found in APPENDIX D. Once Kennedy's counsel learned about this travesty, he filed a motion to supplement the record with the video which the court granted. If the court had, indeed, reviewed the video they would not have granted the motion to supplement the record. Then, inexplicably, the same court refused to grant a rehearing on the merits of Kennedy's appeal. The order and opinion in Kennedy, id. is erroneous and should not be deferred to by any other court. The U.S. District Court erred in its ruling and the U.S. Court of Appeals should have issued a C.O.A. because this matter was brought to its attention in Kennedy's brief.

Lastly, it should be noted that two different state appellate

judges who reviewed Kennedy's case dissented with the majority that denied relief for Kennedy. The Hon. Dauphinot with the Texas 2nd Court of Appeals dissented in Kennedy's direct appeal (See Kennedy, id.), and the Hon. Alcala with the Texas Court of Criminal Appeals dissented with the majority in refusing to hear Kennedy's case in his state habeas petition (See APPENDIX C) as that court denied Kennedy habeas relief without written order. Again, Kennedy has shown that "jurists of reason" found Kennedy's claims "debatable" encouraging further proceedings by the U.S. Court of Appeals for the Fifth Circuit.

Another issue involving the "deadly weapon" aspect in Kennedy's case pertains to the constitutionality of how the state found Kennedy guilty of using his bare hand as a "deadly weapon" without any proof that he knew or should have known that pushing another adult male one time in the chest was use of a "deadly weapon". The district court refused to rule on the merits of this claim stating the claim was procedurally defaulted for review due ^{to} Texas law. The Texas Code of Criminal Procedure states in Section II.D.3.b. regarding charging instruments such as the indictment that,

"A complaint that a statute is unconstitutional as applied to the defendant must be raised in the trial court, but a complaint below is not required if the statute is facially invalid or void 'ab initio'..."

For the sake of brevity, Kennedy requests this Court ~~to~~ refer to the argument and case law cited by Kennedy's habeas proceedings counsel in his petition for writ of habeas corpus found in APPENDIX B in regards to the constitutional issues of convicting Kennedy of using a "deadly weapon" without any proof of a culpable mental state regarding the "deadly weapon".

The district court should have reviewed the merits of Kennedy's

claim that his Due Process Rights were violated when the trial court convicted him of using a "deadly weapon" without any proof of a 'mens rea' because Kennedy's trial counsel was constitutionally deficient for not making the proper objection as required by the applicable Texas law. The main issue of contention in Kennedy's trial was whether or not he used a "deadly weapon", so it is inexcusable that Kennedy's trial counsel failed to make the proper objection to the "deadly weapon" charge to at least preserve the issue for appellate purposes. Kennedy's trial counsel was so inept that he most likely was not even aware that such an objection was available and imperative in Kennedy's case. In APPENDIX G Kennedy has provided some of the trial counsel's notes from his file, and it can be seen that he did not do any "legal research" until approximately one week before Kennedy's trial commenced. This ~~failure to object~~ is certainly deficient counsel performance that affected the outcome of Kennedy's trial in accordance with the standards set forth by this Court in Strickland v. Washington, 104 S.Ct. 2052 (1984). This constitutionally deficient trial counsel performance should have been sufficient to overcome the procedural default and allow the district court to consider the merits of the claim and to allow the circuit judge to issue a C.O.A. while conforming to the standards set by Slack v. McDaniel, 120 S.Ct. 1595 (2000) and Rocha v. Thaler, 626 F. 3d 815 (5th Cir.2010). There are several court decisions where claims were heard on the merits in sufficiency claims that were procedurally barred from review where the issue was presented to the state courts and lower federal courts in terms closely related. In Brown v. Collins, 937 F.2d 175, (5th Cir.1991) the court concluded that ~~an appellant~~ was not procedurally barred from raising a constitutional

claim because his challenge in the state courts did not expressly make the exact same claim although they were similar and related. In Morris v. Dretke, 413 F.3d 484 (5th Cir.2005) at 491 the court opined,

"As a general rule dismissal is not required when evidence presented for the first time in a habeas proceeding supplements, but does not fundamentally alter, the claim presented..."

Kennedy believes that all of the claims made regarding the "deadly weapon" aspect of his conviction are so closely related that they all should be heard on the merits.

It is Kennedy's understanding that the state used hypothetical and theoretical testimony from the medical examiner to show that the single push by Kennedy to Mr. Florence could have caused "serious bodily injury" or "death" which is the only testimony that could have conceivably promoted the "deadly weapon" charge. This theoretical testimony completely contradicts the factual testimony by the same witness and other testimony by the prosecution's witnesses. Please refer to the trial record in APPENDIX F (Reporter's Record, Volume 3, pages 35 through 52) concerning the head injury Mr. Florence sustained during the theft-attempt and his overall sense of his health the day of the incident. This hypothetical and theoretical evidence to establish the legal sufficiency of the "deadly weapon" finding in Kennedy's case should not have been showed greater weight than the factual evidence. Kennedy believes this is in contradiction to Jackson.id. - Kennedy believes the jury was overwhelmed by sympathy for Mr. Florence's widow and failed to act rationally. The district court erred in not considering such, and the circuit judge should have issued a C.O.A.

Finally, Kennedy prays this Court will review the trial record

asks this Court to consider the numerous instances of constitutionally deficient trial counsel found just in the "guilt/innocence" phase of Kennedy's trial that can be found in APPENDIX F. The circuit judge did not even mention in his order denying a C.O.A. the free-standing ineffective-assistance claims. The circuit judge was aware that Kennedy filed his C.O.A. application and brief as a 'pro se' state prisoner, and Kennedy believes that the circuit judge should have considered the free-standing 'ineffective-assistance' claims that Kennedy's habeas counsel briefed before the district court.

Here are some instances that Kennedy believes ^{are} constitutionally deficient trial counsel:

1. Prior to the commencement of ^{the} voir dire part of Kennedy's trial, the trial counsel convinced Kennedy that they should withdraw a motion in limine regarding the way the state could use Mr. Florence's death in order to mitigate the sympathy the state would attempt to evoke from the jury. This is on the record in portions of the trial record not included in this petition. This hurt Kennedy's cause severely. There was no rational trial strategy for Kennedy's trial counsel to withdraw said motion in limine.

2. In APPENDIX F in the Reporter's Record, Volume 3, page 17 in lines 14 through 19 trial counsel misstates the law and confuses issues in his opening statement.

3. In APPENDIX F in the Reporter's Record, Volume 3, page 17 trial counsel should have objected to this testimony because she was not present and actually witness the incident. The trial counsel's cross-examination revolved around the testimony that should have been objected to in the first place.

4. In APPENDIX F in Reporter's Record, Volume 3, pages 28-33, trial counsel did not even bother to cross-exam the state's witness which was unreasonable.

5. In APPENDIX F in Reporter's Record, Volume 3, pages 45-47, trial counsel should have objected to the medical examiner's hypothetical and theoretical testimony which was used to justify the "deadly weapon" finding.

6. In APPENDIX F in Reporter's Record, Volume 4, pages 54-57, the prosecution misstated the law in their closing argument to which trial counsel should have objected.

7. In APPENDIX F in Reporter's Record, Volume 4, pages 55-68, in trial counsel's closing argument he repeatedly misstates the charges while delivering a convoluted and confusing closing statement.

These instances along with the 'ineffective-assistance' claims presented to the district court in Kennedy's habeus petition prejudiced Kennedy and affected the outcome of the trial. Kennedy believes these cumulative instances of deficient performance violate the law and standards set forth in

United States v. Cronin 466 U.S. 648 (1984)

Why didn't trial counsel call any witnesses to testify at the trial to at least have an adversial process to fight the "deadly weapon" accusation? There were eye-witness statements given to the police right after the theft-attempt which can be found in APPENDIX G which could have helped Kennedy. In short, Kennedy suffered from constitutionally deficient trial counsel performance that both prejudiced Kennedy and affected the outcome of the trial.

CONCLUSION

Kennedy believes he has shown how the U.S. Court of Appeals for the Fifth Circuit erred in denying Kennedy a certificate of appealability to review the U.S. District Court's denial of habeus relief. In Dretke v. Haley, 124 S.Ct. 1847 (2004) at pages 1854 and 1855, Justice Stevens stated in his dissenting opinion,

"The unending search for symmetry in the law can cause judges to forget about justice. This should be a simple case...The Court has held that in cases in which the cause and prejudice standard is inadequate to protect against fundamental miscarriages of justice, the cause and prejudice requirement 'must yield to the imperative of correcting a fundamentally unjust incarceration'[Engle v. Isaac, 102 S.Ct. 1558 (1982)]

Kennedy believes that Justice Stevens' sentiments should apply to Kennedy's case. Kennedy did not use a "deadly weapon" in his shop-lifting attempt. The only evidence introduced in Kennedy's trial in the entire record shows that Kennedy only pushed Mr. Florence one time in the chest with his bare, open hand. "Kennedy did not strike Mr. Florence with the boxed television or even make contact with Mr. Florence with the television as the video evidence and witness testimony shows, so the lower courts must be ruling that Kennedy's bare hand is the legally sufficient "deadly weapon". Jurists of reason have ruled very differently on whether a person's bare hands can be construed as "deadly weapons", and most importantly the U.S. Court of Appeals for the Ninth Circuit has ruled in U.S. v. Rocha, id. that bare hands are not legally sufficient "dangerous weapons". Two separate appellate judges that have reviewed Kennedy's case have dissented against the majority opinion denying Kennedy relief. The Texas appellate courts do not even agree whether a person's bare hands

are legally sufficient "deadly weapons", and the state's highest criminal appeals court has not been consistent in its treatment of the issue as well. The majority of other states do not prosecute bare hands as "deadly or dangerous weapons".

Kennedy's case is the sort of arbitrary prosecution that the appellate courts in both the state and federal systems should intervene upon. What is the difference in how Kennedy used his bare hand in the shop-lifting attempt and every misdemeanor assault or simple robbery case ever prosecuted in Texas or elsewhere in which a defendant pushed or punched another? The circumstances and legal theories concerning 'mens rea' in "deadly weapon" aspects of criminal prosecutions affect every single U.S. citizen ever accused of such. Texas statutes should be reformed to require proof beyond a reasonable doubt that the accused knew or should have known they were employing or exhibiting a "deadly weapon" in their prosecution which would prevent future disparate outcomes.

Kennedy acknowledges that federalism and comity are integral aspects of our nation, but they must not supercede basic fairness and common sense in our country's criminal justice systems.

Kennedy prays this Court will grant his Petition For Writ Of Certiorari and review the circuit judge's decision to deny Kennedy a C.O.A. and any other issues this Court deems appropriate.

Respectfully submitted,



William Alan Kennedy, 'pro se'

T.D.C.J. ID# 1740869

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