No. 19-5860

ORIGINAL

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

T'Challa Rashaed Washington — PETITIONER
(Your Name)

vs.

Lorie Davis,TDCJ-Director — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The District Court of Appeals Eastern Texas of Lufkin Division
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

T'Challa Rhashaed Washington #1773263
(Your Name)

Darrington Unit-59-Darrington RD.
(Address)

Rosharon,Texas 77583
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

A: WHETHER THE DISTRICT STATE COURT OF APPEALS RENDERED A DECISION IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS, WHEN UNREASONABLY APPLIED THE JACKSON V VIRGINIA STANDARD IN MR. WASHINGTON'S CASE ?

B: WHETHER THE DISTRICT STATE COURT OF APPEALS RENDERED A DECISION IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS, WHEN UNREASONABLY APPLIED THE STRICKLAND V WASHINGTON STANDARD IN THIS CASE ?

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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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[X] is unpublished.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[X] is unpublished.

[X] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix C 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[X] is unpublished.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 CRIMINAL APPEALS court appears at Appendix D to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 07/02/2019.

[X] 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: N/A, 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 N/A (date) on ____ (date) in Application No. A____.

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

[X] For cases from **state courts**:

The date on which the highest state court decided my case was 11/26/2014. A copy of that decision appears at Appendix C.

[ ] A timely petition for rehearing was thereafter denied on the following date: N/A, 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 N/A (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

This case involves Amendmends V and VI to the Constitution of the United States providing Effcetive Assistance of counsel and a right to the Equal protection of the law: Amendment V

"No person shall be held to answer for a capitol or otherwise infamous crime,unless on a presentation or indictment of a Grand Jury,except in cases 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 offence 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 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 accussed 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 with the witnesses against him;to have compulsory process for obtaining witnesses in his favor,and to have the assistance of counsel for his defence."
made applicable to the states by Section 1 of Amendment XIV to the Constitution of the United States:
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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

law which shall abrige 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 law.

STATEMENT OF THE CASE

T'Challa Rashaed Washington was tried and convicted for the offense of "Possession with the Intent to Deliver between one and four grams of cocaine" on March 22,2012,Cause No.21808,in the 411th Judicial District Court of Polk County,Texas. Petitioner pleaded Not Guilty,the offense was alleged to have occured August 18, 2010. Petitioner Appealed his conviction. The Appeal was advanced before the First Court of Appeals,located in Houston,Texas cause no.01-12-00460-CR. Said Court affirmed the conviction on November 26,2013. Afterwards,Petitioner advanced a Petition for Discretionary review,cause no.1810-13,before the Texas Court of Criminal Appeals,located in Austin,Texas. said P.D.R. was refused April 9,2014. Petitioner collaterally challenged the Constitutional of his confinement via State Habeas. On November 26,2014,the C.C.A. denied the writ without written order,cause no.21,808,Ex Parte Washington. Thereafter,Petitioner Advanced a Federal Writ, cause no.9:15-CV-133, on August 13,2015,before the U.S. D.C., Easter District of Texas,Lufkin Division,cause no. 9:15-CV-00133. Said Writ was given a "Report and Recommendation" by U.S. Magistrate,denying Petitioner relief,in Memorandum dated September 25,2018,denying

STATEMENT OF THE CASE

Petitinner's writ without consideration.

Petitioner's objections to Magistarte's Report and Recommendation,under the erroneous premise that Petitioner's objection were not timely. The U.S.D.C. subsquently discovered Petitioner's objection was,in fact, timely presented and construed Petitioner's "Notice of Appeal" as a Rule 59(e),F.R.C.P.,requested to "Alter or Amend Judgment" in light of the non-consideration of Petitioner's objection.

The Court subsequently determined Petitioner's objection lacked merit and,again,adopted the Magistrates recommendation and denied Petitioner's relief pursuant to its order dated Oct.09,2018,contending that the U.S D.C. erred and abused its discretion in denying Petitioner's Writ, and believing jurist of reason would find the District Court's ruling debatable or wrong,Petitioner Appealed. The Appeal was advanced to the United States Court of Appeals,5th Cir,cause no: 18-40943,Washington v Davis. On December 7,2018,after granting Petitioner leave to proceed in Forma Pauperis,the Court issued a 40 days order for the filing of a COA w/ Brief in support. On January 15,2019,Petitioner advanced his first "Motion For Extension of Time" to

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advance his COA w/brief in Support,requesting additional twenty (20) days to advance his COA,making the due date for filing the same February 06,2019. Unfortunately,the U.S.C.A. on 07/02/2019,denied the COA. On 07/15/2019,Petitioner filed a "Motion for Reconsideration" but on July 26,2019,The U.S.C.A. for the Fifth Cir. Court stated that the Motion for Reconsideration was untimely under the 5th Cir. R. 27 has expired.

REASONS FOR GRANTING THE PETITION

A: CONFLICT WITH OTHER COURTS' DECISIONS.

The Dist. Court of Appeals unreasonably applied the Jackson v Virginia standard and the record did not supports its determination that the evidence was sufficient.

In analyzing a Jackson claim,federal courts look to the state law to determine the substantive elements of the offense.Jackson 443 U.S. at 324n 16;Coleman 132 S.CT at 2064. In the instance case,Washington was convicted of possession with intent to deliver cocaine under Texas Health and Safety Code §§481.112(a)(c),481.112 (WEST 2010). A person "possesses" a controlled substance if he exercises "actual care,custody control,or management" over it. TEX.HEALTH & SAFETY CODE ANN §481.002(38). Thus,the State must prove that a person :(1) exercised control,management,or care over the substance;and (2) knew the substance was contraband. Evans v State 202, SW 3d 158,161 (TEX.CRIM. APP. 2006): Poindexter 153 SW 3d 402,405 (TEX.CRIM. APP. 2005).

Here,the Texas Dist.Court of Appeals considered Washington's insufficient evidence claim on direct review under the appropiate JACKSON STANDARD. Because it issued the "the last unreasonable opinion" on the matter,the intermediate appellate decision should be reviewed to determine

REASON FOR GRANTING THE PETITION

whether the denial of this claim was contrary to or an unreasonable application of federal law. See Ylst v Nunnemaker,501 U.S. 797,803 (1991).

In the case at bar,evidence that Petitioner sold drugs to the confidential informant on August 18,2010,is not in the record. No reasonable trier of fact,when viewing the evidence in the light most favorable to the verdict,could have found sufficient evidence to convict Petitioner. Jackson v Virginia,443 U.S. 307 319 (1979).

The Dist. Court of Appeals' resolution of this case resulted in an unreasonable application of well-established Supreme Court Law.

During the alleged controlled buy on August 18,2010,the C.I.'s video equipment malfuctioned. What police were left with was a videotape in which Petitioner was not shown in. An audiotape allegedly with Petitioner and the C.I. discussing drug sales which discussion is not on the audio recording.(3RR 54,LNS 17)(" No.[Petitioner] didn't say anything about drug or money;") None of the buy money was connected to Petitioner: and police had no means to search the C.I. prior to or after the alleged controlled buy in her private areas. Under U.S. V MORELAND,665 F3d 137, 149 (5th Cir 2011) which intructed courts to consider both supporting and counter-availing evidence when conduct-

ing a sufficient analysis on federal habeas review). But the Dist. Court of Appeals did not comported with United States Supreme Court precedent,which directs reviewing courts to consider all of the evidence."[A] reviewing court must consider all of the evidence admitted at trial when considering a Jackson claim." McDaniel v Brown 558 U.S. 120,131 (2010) Thus,the Dist. Court of Appeals was required under controlling federal constituional law to consider all of the evidence-even counter-availing evidence — and then make inference in the light most favorable to the verdict. Here, the Dist.Court of Appeals did not do that.

In addition,Allegedly,Petitioner was accused of committing four (4) distinct drug actions on four different days,i.e.,August 10,2010; August 18,2010; August 19,2010; and September 17,2010. The District Court Magistrate stated on his recommendation (P.16) " this court cannot find any testimony elicited regarding an August 10, 2010,transaction."This find by the magistrate was not considered by the Dist. Court of Appeals. Ignoring the Supreme Court precedent of McDaniel v Brown 558 U.S. 120,131 (2010).See Coleman V Johnson 132,S.CT.2060(2012) in which the Supreme Court held that a lower court con-

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ducted an improper analysis when it made a negative inference from the facts. See Lassaint 79 SW 3d 736,746 (TEX. APP. CORPUS CHRISTI,2002)which held that possession of drugs means more than mere presence at the scene. The Lassaint court noted that to establish criminal liability as a party to the offense of possession,the prosecution must prove that the defendant was more than merely at the place where contraband is located.79 SW 3d at 739.

Texas courts use a non-exhaustive list of factors to determine whether the evidence affirmatively links an accused to contraband: (1) whether the accused was present when the search was conducted;(2) whether the contraband was in plain view;(3) whether the accused was in close proximity to and had access to the contraband;(4) whether the accused was under the influence of norcotics when arrested;(5) whether the accused possessed other contraband or narcotics when arrested;(6) whether the accused made incriminating statement when arrested;(7) whether the accused attempted to flee;(8) whether the accused made furtive gestures;(9) whether there was an odor of contraband;(10) whether other contraband or drug paraphernalia was present;(11) whether the accused owned or had the right to possess the place where the drug were found;

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(12) whether the place where the drugs were found was enclosed;(13) whether the accused was found with a large amount of cash;and (14) whether the conduct of the accused indicated consciousness of guilt. EVANS 202 SW 3d 158, 162n 12 (TEX.CRIM.APP. 2006):OLIVAREZ 171 SW 3d 283,291 (TEX.APP.- Houston [14th Dist] 2005,no pet.) These were factors that the Dist.Court of Appeals did not considered.

As can be gleaned by the above argument,authorities and case law,the Dist. Court of Appeals unreasonable applied the Jackson standard in this case. The Dist.Court of Appeals' decision to affirmed Washington's conviction contraveness established federal law under Jackson V Virginia 443 U.S. 307 (1979). In light of the minimal evidence against him,no rational trier of fact could have found the elements of the crime beyond a reasonable doubt.

Washington respectfully asks this Honorable Court to grant his application for a Writ of Certiorari,order his conviction for possession of a controlled substance with intent to deliver be vacated and set aside,and order Respondent to release Washington from custody.

In sum,the state's case was not simply underwhelming,it was constitutionally deficient. It only proved that someone sold drugs to the C.I. but did not proved that Washington was that individual.

Mere presence is simply not proof beyond a reasonable

REASONS FOR GRANTING THE PETITION

doubt that Washington posses a controlled substance with the intent to deliver. The evidence was completely lacking of care,custody,and control;thus the evidence was insufficient and this court should grant Washington his requested relief.

Washington is entitled to federal relief,section 2254(d) poses no bar to relief.Jackson V Virginia 443,US 307 (1979),constitutes clearly established federal law,as established by the Supreme Court of the United States. Santellan V Cockrell,271 F3d 190,193 (5th Cir 2001). The Dist. Court's decision was contrary to Jackson----and was an unreasonable application of that decision---insofar as it found evidence that Washington sold drugs to the C.I. on August 18,2010.

Here,the state presented extremely limited physical evidence and the Dist. Court of Appeals erred when it held that a rational juror could find Washington guilty based solely on his presence on premises where narcotics had been sold. Because the state only demonstrated Washington was present [the videotape did not show the individual's face who sold drugs to the C.I.] at that location where drugs were sold,the Dist. Court of Appeals unreasonably determined the evidence was sufficient to sustain his drug-trafficking conviction.

REASONS FOR GRANTING THE PETITION

The Dist.court's resolution of Washington's appeal constitutes an unreasonable application of Jackson. Martinez V Johnson,255 F3d 229,244 (5th Cir 2001)(Jackson represents clearly established law and may be unreasonably applied in a particular case) This case falls squarely in this category.

B. Whether the Dist.Court of Appeals rendered a decision in conflict with decisions of this Honorable and other Courts of Appeals when unreasonably applied the Strickland standard in this case ?

Petitioner contends that he was denied the effective assistance of counsel as guaranteed under the Art.1,Sec. 10 of the Texas Constitution and under The Sixth and Fourteenth Amendments to the United States Constitution.

Petitioner cites several areas where ,he contends his trial counsel failed to provide him with the requisite effective assistance of counsel which is constitutionally mandated and the Dist. Court of Appeals unreasonable applied the Strickland v Washington standard.

A. Failure of trial counsel to object to the statement he made to trial judge when Washington was being qualified for indigent counsel.

Trial counsel had a duty to object on grounds that use of Washington's answers to the questions posed by the

REASONS FOR GRANTING THE PETITION

judge during the colloguy violated Petitioner's right to a detached and neutral judge. The record clearly shows that the prosecutor's main objective was to use the judge as a witness against Petitioner in order to persuade the jury that Washington was an admitted "drug dealer." (3 RR-17- 161-179). " And open court when asked by this judge,"What he did for a living ? Washington stated,he is a drug dealer." (3RR-17).

The State attempts to create "trial strategy" to justify Trial counsel's failure to object,however,the Fifth Circuit has made clear that "justification not evident on the record and presented for the first time in response to a petition for a habeas corpus by the state have little value." Virgil v Dretke, 446 F3d 598,611 (5th Cir 2006) but the same Court that made this ruling had unreasonable applied Strickland standard in similar situation. This case at bar falls squarely within this category.

It soon as the prosecutor indicated in his opening statements that he intended to use Washington's statement to Judge Trapp as evidence,Counsel was duty bound to object and move to have the judge recuse himself from presiding over the case. The right to an impartial adjudicator,be it judge or jury,is a bedrock constitutonal guarantee. See Gray V Mississipi,481 US 648,668 (1987).

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Moreover,procedurally trial counsel had a duty to see that Judge Trapp complied with the state law,which required Judge Trapp to sua sponte disqualify himself from presiding over the trial since the State intended to have him"step down" from the bench in its use of Judge Trapp as a witness against Petitioner. See Hensarling v State 829 SW 2d 168,170 (Tex.Crim.App. 1992);Franks 90 SW 3d 771,781 (Tex.App. Forth Worth 2002,no pet.) The counsel's failure to properly object deprived Washington of his substantive and procedural and state and federal Constitutional rights.

B. Trial counsel failed to request that the State be made to elect which drug transaction it was submitting to the jury.

The prosecutor argued to the jury during closing:

" you heard evidence about at least three deliveries that took place between August 18th and the middle of September,which [the C.I.] was sent over in a covert capacity with a body mic and the video camera to make three separate purchases from him. And I would submit to you each of those cases have been proven beyond a reasonable doubt."

Petitioner was only on trial for the alleged transaction said to occurred on August 18th. yet,the State went so far as to actually admit into evidence the physical drugs from all three alleged drug sales.(3 RR-129)

The rule requiring election has been recognized by the

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Texas courts since at least 1870. State v Bradley,34 Tex. 95,97-98 (1871) The rule requires that where the State has pled a single offense and the evidence shows more than one incident of the same unlawful conduct described by the indictment,committed at different times, the state must elect the particular incident upon which it relies for conviction upon timely request of the defendant. Phillips 193 SW 3d 904,909 (TEX.CRIM.APP. 2006).

An accused must be tried for the offense with which he is charged. He may not be charged with one crime,yet tried for multiple crimes or for being a criminal in general. Staffort 813SW 2d 503,506 (TEX.CRIM.APP.1991).

The prejudice suffered by Washington is evident in the state's closing argument where the State heavily emphasized the extraneous drug transaction and essentially argued that the jury should consider those case as proof that Petitioner was a "drug dealer" in general and should be convicted as such. The State's proof of a drug transaction between Washington and the C.I. on August 18, 2010 was nonexistence. The extraneous drug transactions were used to convict Washington as a drug dealer in general because of the lack of evidence proving he dealt drugs to the C.I. on the date alleged in the indictment.

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The Court's resolution of this claim is lacking of justification and is an unreasonable application of well established Supreme Court law under Strickland.

C. Trial counsel failed to object to the instruction during the state's case-in chief of series of highly inflammatory and prejudicial extraneous offenses for which the State failed to give notice. such extraneous offense evidence included:

1) Petitioner was the target of the Sheriff's Narcotics investigators for nearly a year,

2) Petitioner was arrested on several different charges involving the distribution of drugs that occurred between August and September of that year,

3) Petitioner admitted selling drugs in the past;and

4) Petitioner told Judge Trapp that he sold drugs in the past.

Prior to trial counsel filed a request for notice of extraneous offenses the State intended to introduced. None of the extraneous offenses listed above were included in the State's notice.

Washington present to this honorable Court few cases in where the same court has ruled on similar counsel's actions be ineffective assistance of counsel,but in this case at bar were ignored by the Court.

VELA V ESTELLE,708 F2d 954(5th Cir 1983)(Defense counsel's failure to object to prejudicial testimony which was used to inflame minds of jury,constitutes ineffective assistance of counsel.); LYONS V McCOTTER 770,F2d 529 (5th Cir 1985)(Where counsel passes over clearly inadm-

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issible evidence,which is prejudicial to defendant,has no strategic and constitutes ineffective assistance); SEEHAN V STATE OF IOWA,37 F3d 389 (8th Cir 1994)(trial counsel's failure to object to highly prejudicial remarks made by the prosecutor during opening arguments deprived defendant of a fair trial and constitutes ineffective assistance of counsel): PORCARO V UNITED STATES 784 F2d 38 (1st Cir 1986) SAGER V MAAS 907 F.SUPP 1412 (D.OR.1995)(Trial counsel's failure to object to irrelevant and unduly prejudicial statements which implied that petitioner was a habitual criminal,allowed the prosecution to introduce evidence of defendant's "unsavory character merely to show that he is a bad person and thus more likely to have committed the crime" constitutes ineffective assistance of counsel); also UNITED STATES V RUSMISEL 716 F2d 301 (5th Cir 1983).

PINNELL V CAUTHORN 540 F.2d 938(8th Cir 1976) (trial counsel's failure to move to suppress tape recording and failed to object the admission of the tape into evidence amounted to ineffective assistance).

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See also HODGE V HURLEY,426 F3d 368(6th Cir 2005)(Trial counsel's failure to object to any aspect of the prosecutors egregiously improper closing argument was objectively unreasonable); and KIMMELMAN V MORRISON,477 U.S. 365 (1986) (attorney failed to make obvious and meritorious objection to tainted evidence forming basis of state's case).

As can be gleaned from the above argument and case laws the District Court of Appeals unreasonable applied the Strickland standard in this case. And the BRECHT V ABRAHAMSON 507 U.S.619,623, 113 S.CT. 1710,123 L.ED 2d 353 (1993).

Although an appellate court looks to the totality of the representation and the particular circumstances of each case in evaluating the effectiveness of counsel,sometimes a single error is so egregious and substantial that it,alone,is sufficient to cause the lawyer's assistance to fall below the constitutionally accepted standard. PERRERO V STATE, 990 SW 2d 896 (TEX.APP..EL PASO 1999). This case falls squarely within this category.

Mr.Washington asserts that he has met the two pronged test to establish the ineffectiveness of his trial counsel. He maintains that he has shown by a preponderance of the evidence,authorities and case laws to support his claim that the District Court of Appeals has unreasonable applied the

Jackson v Virginia standard and the Strickland standard on this case at bar.

Wherefore,premises considered, Washington requests that this Honorable Court grant him the specific relief he seeks in this writ and for such other and further relief to which he may be justly entitled.

This case has shows this Honorable Court that the District Court of Appeals has clearly denied Washington's rights to the 5,6,and 14th Amendments of TX. and U.S. Const.

CONCLUSION

For all of the above mentioned reasons,

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Mr. T'Challa Washington

Date: August 29, 2019