No. 19-5862

IN THE

SUPREME COURT OF THE UNITED STATES

Jorge Ramirez — PETITIONER
(Your Name)

vs.

Lorie Davis — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Fifth Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jorge Ramirez
(Your Name)

12071 F.M. 3522
(Address)

Abilene, Texas 79601
(City, State, Zip Code)

(Phone Number)

QUESTIONS PRESENTED

In state habeas proceedings, Ramirez alleged that his trial counsel was ineffective for failing to investigate for, develop and present evidence in support of his chosen theory of defense. The state court ordered counsel to submit an affidavit in response, but counsel blatantly ignored the order. The state court turned a blind eye, refused Ramirez's numerous requests to hold a hearing, and ultimately denied the claim without remark.

Ramirez reurged his claim in §2254 proceedings. The federal district court granted Respondent's motion for summary judgment, and denied Ramirez a COA on the claim.

The Fifth Circuit also originally denied a COA, stating it could not "see a plausible basis for concluding that the state court was unreasonable in concluding no prejudice existed." Ramirez moved for reconsideration. The court found his arguments compelling and granted a COA on his claim.

Pursuant to §2254(d)(1), the state court's application of Strickland must be unreasonable for Ramirez to obtain federal habeas relief. Williams v. Taylor, 120 S. Ct. 1495 (2000) commands that an "unreasonable application" inquiry be objective, not subjective. And, Harrington v. Richter, 131 S. Ct. 770 (2011) sets forth certain determinations a federal court must make in its inquiry.

But, the Fifth Circuit's order does not acknowledge Williams' or Richter's requirements. And, the entirety of its order gives no appearance or indication that it made an objective "unreasonable application" inquiry before concluding that the state court's deicision was not unreasonable. Instead, its analysis and conclusion consisted of one lone, subjective sentence: "Having carefully considered the trial transcript, and given the substantial range of reasonable applications of the Strickland standard as well as the deference owed to the state habeas court's decision, we are not persuaded that Ramirez is entitled to relief under §2254(d)(1)."

The following questions are presented:

1. Was the Fifth Circuit's "unreasoable application" inquiry proper?

2. Did the Fifth Circuit err in concluding that the state court's application of the strickland prejudice standard was reasonable?

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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TABLE OF AUTHORITIES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

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

The opinion of the United States court of appeals appears at Appendix A to the petition and is

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

The opinion of the United States district court appears at Appendix B to the petition and is

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

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

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

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

The opinion of the _____ court appears at Appendix _____ to the petition and is

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

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was March 8, 2018.

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

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: May 17, 2018, and a copy of the order denying rehearing appears at Appendix C.

[ ] 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

This case involves 28 U.S.C. §2254(d), which states in relevant part that:

"(d) - An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

"(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

STATEMENT OF THE CASE

I. Prior Proceedings

Ramirez was convicted in state court of capital murder and sentenced to life without parole. The judgment was affirmed on appeal. Ramirez v. State, No. 01-08-000535-CR, 2010 WL 2306112 (Tex. App. - Houston [1st Dist.], June 10, 2010, pet. ref'd).

The Texas Court of Criminal Appeals refused his petition for discretionary review on November 10, 2010. Ramirez filed a petition for writ of certiorari with this Court, which was denied on June 27, 2011.

On or around June 15, 2012, Ramirez filed a state application for writ of habeas corpus, and memorandum in support, in the 177th District Court, in cause number WR-80,625-02. (ROA 4135-94.)[1] The State filed a Motion Requesting Designation of Issues, which the trial court granted on October 9, 2012. (ROA 3730-31.) On October 23, 2012, Ramirez filed a Motion for Live Evidentiary Hearing. (ROA 3733-34.) In turn, on November 2, 2012, the State filed its "Original State's Answer" and its "State's Proposed Order Designating Issues and for Filing Affidavit." (ROA 3736-41.) On November 14, 2012, the state habeas trial court adopted the State's proposed order, thereby ordering Ramirez's trial counsel to submit an affidavit in response to Ramirez's ineffective assistance allegations by December 18, 2012. (ROA 3743-44.)

On December 10, 2012, before counsel's affidavit was due, Ramirez filed a Motion to Withdraw the trial Court's November 14, 2012, order, and sought an evidentiary hearing. (ROA 3764-67.) This motion was premised on the fact that counsel was under six months active, followed by eighteen months probated, suspension due to unrelated complaints by Ramirez to the State Bar of Texas. Thus, counsel's credibility was already suspect, and could not be properly assessed through an affidavit. Id. The motion was denied.

Ultimately, counsel disregarded the court's order for an affidavit. So, on April 1, 2013, Ramirez filed a "Motion to Deem the Allegations Set Forth in Ramirez's Ineffective Assistance of Trial Claim as 'True'--or, Alternatively, Conduct an Evidentiary Hearing--Due to Trial Counsel's Failure to Comply With [the trial court's] November 14, 2012, Order Instructing Him to Submit an Affidavit in Response to Ramirez's Allegations." (ROA 2662-70.) The trial court either ignored or denied this motion.

1. References to "ROA" are to the appellate record from the United States Court of Appeals for the Fifth Circuit.

Getting nowhere with the trial court, Ramirez petitioned the Texas Court of Criminal Appeals for a writ of mandamus, asking that Court to either order the trial court to construe counsel's blatant silence as acquiescnece to Ramirez's claims or, alternatively, to conduct a live hearing. (ROA 1773-74.) Instead, on January 15, 2014, the Court of Criminal Appeals ordered the trial court to either transmit the application to that court or resolve the issues and transmit the application. (ROA 1775-76.) On or around March 13, 2014, the trial court transmitted the application to the Court of Criminal Appeals without resolving the issues, or an affidavit from counsel. The Court of Criminal Appeals denied the application without written order on May 7, 2014. (ROA 1777.)

Ramirez then filed a §2254 petition in the federal district court on May 19, 2014. Respondent filed a Motion for Summary Judgment, to which Ramirez filed a Reply in Opposition. (ROA 4364-85, 4392.) The district court granted Respondent's motion and dismissed Ramirez §2254 petition on March 31, 2016. The district court also denied Ramirez a COA.

Ramirez applied to the Fifth Circuit for a COA. Originally, on September 22, 2017, that court denied a COA. But, on December 18, 2017, upon Ramirez's petition for reconsideration, the court granted a COA on Ramirez's ineffective assistance of trial counsel claim.

Ramirez appealed the district court's denial of his claim. On March 8, 2019, the Fifth Circuit denied the appeal. (Appendix A.) Ramirez petitioned the court for reconsideration, but that was denied on May 17, 2019. (Appendix C.)

This petition follows.

II. Statement of Facts

At about 3:30 p.m. on July 19, 2007, a green four-door Cadillac plowed slowly forward and lodged into the ivy-colored fence line that ran around a Houston, Texas, apartment complex. (ROA 2982, 2983, 2990, 2997.) The apartment manager and maintenance man were notified, and they went to investigate. (ROA 2996,3002, 3020-22.) They saw a male in the driver's seat; he was unconscious and bleeding from the back of his head. (ROA 3003, 3024, 3028, 3030.) Emergency personnel arrived shortly thereafter and took the victim to the hospital, where he died nine days later. (ROA 2981-82, 3027, 3039, 3246-47.) The victim was Torrin Farrow, and the manner and cause of his death was homicide by a gunshot wound to the back of his head. (ROA 3249.)

In the $2\frac{1}{2}$ hours preceding the murder, Noel Alvarez called Farrow twenty-two times to arrange for Farrow to pick him and Ramirez up. (ROA 3157, 3340-41.) Alvarez sat in the front passenger seat; Ramirez sat in the rear seat behind Farrow. (ROA 3123-25.)

Each claimed the other wanted to buy some Xanax pills from Farrow, (ROA 1852-54, 1868-69, 3121, 3130), and denied knowing that the other intended to rob or shoot Farrow (ROA 1875-76, 3130-31).

Farrow handed a bag containing Xanax pills to Alvarez. (ROA 1885-86, 3130.) Alvarez claimed that he handed the bag to Ramirez. (ROA 3130.) the trio then drove into the aprtment complex parking lot. Alvarez was facing straight ahead when he heard a single gunshot, (ROA 3133), and saw Farrow's body fall forward (ROA 3134). In contrast, Ramirez claimed that after Farrow handed Alvarez the bag of pills, Alvarez directed Farrow into an apartment complex parking lot. (ROA 1885-86.) After Farrow did so, Alvarez yelled, "Oh, shit, the cops, the laws," and pointed left. (ROA 1889.) As Farrow and Ramirez looked left, Ramirez heard a gunshot from inside the car. (ROA 1890.)

Authorities couldn't determine from which direction Farrow was shot. (ROA 3096-3100, 3203, 3258.) But, it was later determined that the fatal bullet came from a .380 semiautomatic pistol. (ROA 3268-69.) And, a .380 bullet casing was found in the right rear seat. (ROA 3202, 3205.) The murder weapon was never located, (ROA 3355-56), but a firearms examiner testified that .380 semiautomatics typically eject the bullet casings up and to the right (ROA 3275). As for where the casing may land after ejection, "nobody can predict." It may hit something and "may end up on the left side or the right side." Id.

In the month or two preceding the murder, Sacramento Soria had seen Alvarez with a .380 pistol on more than one occasion. (ROA 1819.) Gabriel Guzman said that in July or early August 2007, Alvarez offered to sell him a .380 handgun. (ROA 1842.)

Not only was Alvarez an admitted heavy user of Xanax, (ROA 3115), he was also a well known heavy user of Xanax (ROA 1869-70, 1971, 1974). Alvarez also had a prior felony drug conviction. (ROA 3163, 3380.) He would do anything--"except lie"-- to keep from going to prison for the rest of his life. (ROA3163-64.)

While awaiting trial, Ramirez met Christopher Figueroa in the county jail. (ROA 3431-32.) Figueroa was charged with three aggravated robberies. Id. According to Figueroa, Ramirez told him that Ramirez and Alvarez had no money to buy drugs, so they planned to rob and then shoot Farrow. (ROA 3443, 3445.) After Alvarez received the Xanax from Farrow, Ramirez shot Farrow in the back of the head. (ROA 3447.) Ramirez planned to pin the murder on Alvarez by stating that Alvarez had distracted him and Farrow by causing them to look to the left out the window, so that Alvarez could shoot Farrow in the back of the head. (ROA 3664-65.)

Figueroa admitted that he was testifying against Ramirez in hopes of receiving leniency on his three pending aggravated robbery charges. (ROA 3668.)

REASONS FOR GRANTING THE PETITION

A. By making a subjective--rather than objective--"unreasonable application" inquiry under §2254(d)(1), the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power to prevent the lower court from continuing to do so.

After acknowledging that the question before it was whether the state cout's decision involved an unreasonable application of the Strickland prejudice standard, the full extent of the Fifth Circuit's analysis and conclusion is given in one sentence: "Having carefully considered the trial transcript, and given the substantial range of reasonable applications of the Strickland standard as well as the deference owed to the state habeas court's decision, we are not persuaded that Ramirez is entitled to relief under §2254 (d)(1)." (See Appendix A, at 4.)

The "unreasonable application" inquiry under §2254(d)(1) should be an objective, not subjective, one. See Williams v. Taylor, 120 S. Ct. 1495, 1521-22 (2000) ("Stated simply, a federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable. [It] should not transform the inquiry into a subjective one..."). To determine whether the state court's decision was objectively unreasonable, a federal court "must determine what arguments or theories supported or...could have supported the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with," in this case, the Strickland prejudice standard. Harrington v. Richter, 131 S. Ct. 770, 786 (2011). If there is no possibility of disagreement among fairminded jurists, then Ramirez is entitled to relief. See id.

Here, while the Fifth Circuit recognized Williams' reuqirement that a state court's application of federal law not only be erroneous or incorrect, but that it "must also be unreasonable," it wholly failed to acknowledge that Williams requires the inquiry into the state court's application be objective. (See Appendix A, at 4.) Likewise, while the Fifth Circuit acknowledged Richter's observation that "even a strong case for relief does not mean that the state court's contrary conclusion was unreasonable," it wholly falied to acknowledge the initial determinations Richter required the Fifth Circuit to make before concluding that the state court decision was not unreasonable. Id. Moreover, the Fifth Circuit didn't specify any arguments or theories that it considered reasonably supportive of the state court's decision. Id.

Ramirez submits that the combined force of these omissions by the Fifth Circuit is

telling: The Fifth Circuit reached its conclusion without regard to the possibility of there being no arguments or theories to support the state court's decision, and/or without regard to the possibilty of there being no disagreement among fairminded jurists that any conceived argument(s) were inconsistent with the Strickland prejudice standard. Instead, it relied only upon general factors such as that Strickland has a substantial range of reasonable applications, and that the state court is owed deference, and then simply concluded that the state court decision was not unreasonable without offering one objective reason on how it reached that conclusion.

Such is precisely the type of subjective approach condemned by Williams.

Because the Fifth Circuit used a subjective approach to the "unreasonable application" inquiry here, rather than the objective approach commanded by Williams and Richter, this Court should grant certiorari to ensure that the Fifth Circuit doesn't continue to do so.

B. The state court's application of the Strickland prejudice standard was unreasonable; the Fifth Circuit's conclusion to the contrary was guided by a misapprehension, oversimplification and oversight of numerous facts, as well as an obvious failure to realize what Alvarez's and Figueroa's "substantial credibility issues" signified.

The only issue decided by the Fifth Circuit was that the state court did not unreasonably apply the Strickland prejudice standard. (See Appendix A, at 3-4.)

But, the court misapprehends, oversimplifies and overlooks several facts concerning Alvarez and Figueroa which, when properly considered in their totality, establish that Alvarez--unlike Ramirez--had a strong motive and the means to kill Farrow for his Xanax, and Figueroa wanted nothing more than to get out of jail on his three pending aggravated robbery charges. For instance, the court states simply that Alvarez "called Farrow on the telephone numerous times" to arrange for Alvarez and Ramirez to be picked up. (See Appendix A, at 2.) The fact is, Alvarez actually called Farrow 22 times in the $2\frac{1}{2}$ hours preceding the murder. Also, the court grossly understates the frequency of Alvarez's usage of Xanax by stating that "Alvarez was an admitted user of Xanax." The fact is, Alvarez was an admitted, and known, heavy user of Xanax. (ROA 1869-70, 1974, 3115.) Finally, the court acknowledges that Alvarez was seen with a .380 handgun "in the few months before the shooting." (See Appendix A, at 2.) The fact is, the court wholly overlooks the fact that Alvarez tried to sell Gabriel Guzman a .380 handgun shortly after the murder (ROA 1842). Id.

Consequently, the Fifth Circuit failed to realize what these facts indicate, and what their totality evinces. The high frequency of Alvarez's use of Xanax plainly

indicates his need for it. The sheer number of times he called Farrow in the relatively short period of time before the murder indicates his urgency to obtain Xanax. And, his posession of a .380 handgun before and after the murder suggests he possessed one at the time of the murder. Because of its errors, the Fifth Circuit failed to realize that these facts and implications evince that Alvarez had a strong motive and the means to kill Farrow. Moreover, the Fifth Circuit's oversight prevented it from seeing that Alvarez's selling the .380 handgun so soon after the murder after possessing it so long prior to, suggests his guilt and awareness to rid himself of the evidence. The Fifth Circuit wholly failed to realize that, when properly considered with Alvarez conducting the drug transaction, these facts plainly evince that it was Alvarez--not Ramirez--who wanted (needed) the Xanax, and killed Farrow for them.

Regarding Figueroa, the Fifth Circuit doesn't even acknowledge or consider that Figueroa was in jail on three pending aggravated robbery charges, and was testifying against Ramirez in an attempt to gain leniency on those charges.

Indeed, the errors of the Fifth Circuits ways is reflected in its tidy comment on Ramirez's argument to the court concerning Alvarez's and Figueroa's credibility issues: "He discounts the effect of the testimony given by Alvarez and Figueroa, asserting that those two men had substantial credibility issues." (See Appendix A, at 3.) Not only is this statement an inaccurate reflection of the substance of Ramirez's argument to the court, it reflects the court's failure to grasp that the totality of the evidence evinces that Alvarez had motive and means to shoot Farrow and indeed was the shooter, and that Figueroa was trying to obtain a get-out-of-jail-free card.

The Fifth Circuit pronounced that it "carefully considered the trial transcript," but the above errors reveal that the court failed to properly consider it. These errors undoubtedly affected the court's judgment, thus warranting review.

Because properly considering all the facts, and given what Alvarez's and Figueroa's "significant credibility issues" actually signified, there can be no doubt that the state court unreasonably applied the Strickland prejudice standard--a standard that only required Ramirez to demonstrate that a single juror would have harbored a reasonable doubt of his guilt. See Buck v. Davis, 137 S. Ct. 759, 776 (2017). Foremost, the state court could not have reasonably concluded that there was a reasonable probability of Ramirez being convicted on Alvarez's and Figueroa's testimony even had counsel explained the casing evidence. Again, the credible evidence gave Alvarez motive and means, and evinced him as the shooter, not Ramirez. And, the evidentiary value of Figueroa's testimony is severely weakened by his attempt to gain leniency on his own charges. Thus, had counsel explained the casing evidence, the strong possibility of Alvarez being the

killer would have been on the jurors minds, plainly causing a reasonable doubt as to Ramirez's guilt. Undoubtedly, at least one juror would have ~~refused~~ continued to harbor a reasonable doubt with nothing more than Alvarez's and Figueroa's testimony.

But, the casing caused the jury to look away from Alvarez, and toward Ramirez. Indeed, despite all the evidence that pointed toward Alvarez, the .380 bullet casing's proximity to the right of Ramirez (along with the firearms examiner's testimony) alone was sure to secure Ramirez's conviction without an explanation from counsel. As the State argued in closing:

> Remember the casing? Remember where it was? Directly to the right of where the defendant was sitting. And, how do .380 semiautomatics eject casings? Up and to the right. And I know that casings can move, but do you really think if [Alvarez] shot Farrow, that the casing went up and to the right, over [Alvarez], over the back seat and crawled under the T-shirts? Does that make sense?
>
> What makes sense is the defendant shoots him, the casing ejects up and to the right and rolls under the T-shirts. The physical evidence doesn't lie.

(ROA 1689-90.)

This argument obviously assumes the gun was held in a conventional manner. And, without counsel painting a different picture, this is certainly all the jury imagined. Thus, as was made clear by the State's argument, the casing evidence implicated Ramirez while simultaneously exculpating Alvarez.

But, the "canting" theory would have provided a very likely explanation for how the casing could have landed in the back seat if Alvarez was the shooter. Through exemplary pictures, and excerpts of an expert's testimony from another Texas trial consisting of a factually similar scenario, Ramirez demonstrated to the Texas courts that Alvarez could have fired the gun while holding it "canted," i.e., knuckles and palm rotated toward the ground, causing the ejection port to face up (rather than toward the windshield) when the gun was fired. (ROA 3625-33, 3769-3801, 4329-57.) The excerpts further established that such would cause the casing to eject toward the back seat and upwards, and explain how the casing landed in the seat behind Alvarez. (ROA 3795, 3798.)

The state court couldn't have reasonably concluded that although such a theory provided a possible explanation, it wasn't a likely one. An expert testified to these things in another, factually similar trial, and the "canting" theory was succesfully utilized in that case. Moreover, given the evidentiary support Ramirez submitted, the state court couldn't have reasonably denied Ramirez's claim on the lack thereof. Finally, the state court couldn't have reasonably denied Ramirez's claim on the basis that he failed to establish that he had an expert available to testify to the "canting" theory

or specify what the expert would have testified to. As Ramirez argued, counsel could have familiarized himself with the theory and presented it through the State's experts, just as the State presented it through the defense's expert in the excerpts Ramirez provided (ROA 4345, 4355-56).

There is no mistaking: Although the State spent the bulk of its closing on Alvarez and Figueroa, and only the above-referenced argument on the casing evidence, it was the casing evidence alone that would have secured Ramirez's conviction. Unexplained by counsel, it corroborated and lent credibility to Alvarez' and Figueroa's accounts, not the other way arouind. As the State argued after pointing out the casing's implication: "The physical evidence doesn't lie." (ROA 1690.) But, Alvarez and Figueroa certainly could, and they had every reason to--both were looking to avoid prison time, Alvarez for capital murder, Figueroa for three aggravated robberies. No, the physical evidence didn't lie, but unfortunately due to counsel's failure, it was only allowed to tell one story implicating Ramirez, when another story implicating Alvarez existed.

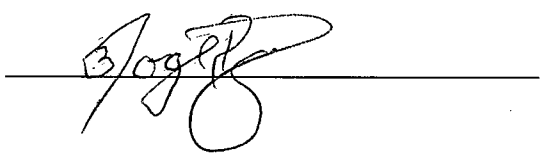
Again, had counsel neutralized the casing evidnce with the "canting" theory, at least some (if not all) of the jurors eyes would have shifted back to Alvarez. His having motive and means, and committing actions indicative of guilt creates a textbook definition of reasonable doubt. And, all Ramirez had to have was one juror to harbor such in order to satisfy the Strickland prejudice standard. Because there was no reasonable probability of the jury convicting Ramirez on the basis of Alvarez's and Figueroa's testimony had counsel explained the casing evidence, the state court's application of Strickland was undoubtedly unreasonable.

For these reasons, Ramirez prays this Court grant certiorari, and review the erroneous judgment of the Fifth Court of Appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: August 13, 2019