No. 19-5947 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Michael Patrick Kennedy — PETITIONER
(Your Name)

vs.

Lorie Davis, Director, T.D.C.J. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States District Court
For The Western District Of Texas San Antonio, Texas
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Michael Patrick Kennedy
(Your Name)

James V. Allred Unit, Texas Department
Of Criminal Justice, CID# 01358289
(Address)

2101 FM 369 North
Iowa Park, TX 76367-6568
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

FIRST QUESTION

If defense counsel omits the necessary trial defense and thereby sustains a perception of substantial guilt so that the substantial guilt was dependent upon counsel's omission in order to survive, can that substantial guilt be used to dismiss ineffective assistance of counsel as harmless?

SECOND QUESTION

Whether, in a self defense case in which the State relies almost exclusively on the argument that the defendant provoked the victim's use of deadly force, the trial court errs in failing to define "provocation" for the jury.

THIRD QUESTION

Whether law enforcement's withholding of prescription pain medication during trial in order to force a mistrial or drive the defendant from the witness stand violates a defendant's rights to a fair trial or due process?

FOURTH QUESTION

When an unreasonable deference to accused ineffective counsel's prima facie perjurious, sworn affidavit yields an unreasonable set of fact findings which are directly causal to dismissal of the habeas corpus appeal has due process been violated?

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[X] is unpublished.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 D 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 207th Judicial District (fact finding court) Comal County, Texas court appears at Appendix E 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 May 28, 2019 .

[ ] 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: June 21, 2019, 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 _____ 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 ceriorari 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

ISSUE I: 'Substantial guilt/ Ineffective assistance of counsel/ Denial of harm analysis'

Sixth Amendment: The right to have the assistance of a lawyer who does not provide ineffective assistance.

Fifth Amendment: The right to due process.

Fourteenth Amendment: The right to due process applied to the State of Texas.

ISSUE II: 'Denial of Provocation definition jury charge'

Sixth Amendment: A faulty jury instruction will constitute a violation of Due Process where the instruction by itself so infected the entire trial that the resulting conviction violates due process.

ISSUE III: 'Withholding pain medication at trial'

Fifth Amendment: The right to due process, to put on a complete defense including defendant's right to testify.

Fourteenth Amendment: The right to due process applied to the State of Texas.

Eighth Amendment: The right to be free from cruel and unusual punishment.

ISSUE IV: 'Unreasonable deference to ineffective counsel violates due process'

Fifth Amendment: The right to due process.

Fourteenth Amendment: The right to due process applied to the State of Texas.

STATEMENT OF THE CASE

This case involved a shooting incident between Michael Kennedy and Officer Richard Kunz that occurred after Officer Kunz stopped Mr. Kennedy for speeding. (RR III:37-39). Officer Kunz testified that, when he approached Mr. Kennedy's vehicle, Mr. Kennedy pointed a barrel of a gun at him. (RR III:49-50) According to Officer Kunz, he then retreated to his vehicle and Mr. Kennedy fired on him with a handgun as he was retreating. (RR III:50-51) Officer Kunz testified that it was only AFTER being fired upon that he returned fire on Mr. Kennedy and he fired approximately sixteen shots at Mr. Kennedy. (RR III:54,69)

At trial, the defense presented expert testimony from three expert witnesses. The first and second expert testified in the fields of acoustics, audio, and video review and both concluded that, in fact, a video of the incident revealed that it was Officer Kunz who fired the first shot. (RR IV:215, 222-26; RR V:36, 51)

The third expert, Dennis McKnight, testified as an expert in the field of law enforcement. He testified that, even assuming that Mr. Kennedy had displayed a gun while Officer Kunz was at Mr. Kennedy's driver's door as Officer Kunz claimed, once Officer Kunz retreated there was no immediate threat and he should not have fired his weapon at Mr. Kennedy. (RR V:121) McKnight also testified that it is permissible for a citizen to use self-defense against a police officer. (RRV:143-44) He concluded that, in his opinion, Mr. Kennedy was acting in self-defense in returning Officer Kunz's fire. (RR V:157)

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[1] References to the Clerk's Record ("CR") refer to the volume number:page number. References to the Supplemental Clerk's Record ("CR") refer to the volume number (trial court case number):page number. References to the Reporter's Record ("RR") of the trial refer to the volume number:page number. References to the Reporters Record for pretrial hearings ("PT") refer to the date:page number.

Subsequent investigation showed that there were forty-five bullet holes in Kunz's patrol unit. After being shot without warning in the neck below his brain stem with a .40 caliber bullet firing at 1142 (FPS), with 714 (PSI) maximum impact[2] Kennedy had fired at least ten rounds from a nine-millimeter handgun and at least thirty rounds from an AK-47 assault rifle. The handgun and rifle, along with another pistol and ammunition, were recovered from Kennedy's vehicle.

A video recording taken from a camera in Kunz's patrol unit was entered into evidence and played for the jury. On crossexamination, Kunz conceded that he did not tell dispatch or the backup officers that Kennedy had fired at him first. He did not recall Kennedy saying on the video "I have been hit" prior to the time he took cover behind his patrol unit. Kunz agreed that, according to the video recording, he had actually fired on Kennedy from behind Kennedy's car and through its back window, a distance of about 15 feet according to the video and shell casing placement, prior to taking cover and calling for backup, but he did not mention this fact in a six-page written statement he prepared the day after the incident. Kunz agreed that a portion of his written statement was therefore "inaccurate." When asked by defense counsel what he did to correct his "inaccuracy," Kunz replied: "I did not alter my statement or change my report. I let them stand and let the evidence stand for those who wish to look at at both and interpret what they believe to be accurate and true."

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[2] See writ of Habeas Corpus under Texas Code of Criminal Procedure, Article 11.07, Ground Four, page 12, labeled in Appeal 28U.S.C. §2254 by United States District Court Western District Of Texas San Antonio Division (USDCWDOTSAD) as Case 5:18-cv-00117-OLG-HJB, Document 2-5, page 18 of 100 and Document 2-7, page 68 of 80 supported by Article 11.07 Memorandum Of Law page 24, section (2)(b) last line and exhibit 10:11 page 11 - USDCWDOTSAD labeled Document 2-5, page 74 of 100.

That same night, shortly following the incident, Officer Kunz consulted with an attorney. (RRIII:71) Officer Kunz agreed to give a written statement to Officers with the Texas Rangers provided his lawyer could first review it. (RRIII:72) During the interview with the Rangers, the Rangers roll played the incident with Officer Kunz to "help [him] recall the events." (RRIII:74-75) In the statement he gave the Rangers, Officer Kunz claimed that, after Mr. Kennedy allegedly pointed a gun at him, he ran and did not stop until he reached the rear of his patrol car. (RRIII:76) In his statement and consistent with his trial testimony, Officer Kunz also claimed Mr. Kennedy fired upon him before he radioed his dispatcher even though he only told his dispatcher that there was a "man with a gun." (RRIII:77) Officer Kunz also claimed in this statement that he did not even draw his gun until after Mr. Kennedy had fired upon him and until after he called his dispatcher even though these claims would later be shown by the video of the incident to be false. (RRIII:77)

STATEMENT OF THE CASE
PROCEDURAL HISTORY

On January 9, 2006, as part of a plea agreement, Michael Patrick Kennedy pleaded guilty to an Information charging him with Aggravated Assault of a Public Servant in Trial Court Case Number CR2006-016. (Supp. I CR(2006-016):11-18) His conviction was later reversed on Appeal. Kennedy v. State, 338 S.W.3d 84, 100-103 (Tex.App. - Austin 2011, no pet.) This ruling ORDERED to be suppressed illegally seized, beyond the scope of the warrant, no probable cause and not used to plan, commit or cover up the charged offence property. Irregardless of this ruling Kennedy was informed by the Court that should he testify at his retrial the suppressed evidence would be held for use in the courtroom against him. Kennedy then did not testify. See Article 11.07 ground No. One, page six labeled by USDCWDOTSAD as Document 2-5, page 12 of 100 and Memorandum Of Law In Supprort of Article 11.07 p5-18, labeled Document 2-7 p49-62.

Upon remamd, the parties continued to file pleadings and notices in Case Number CR2006-016. Nevertheless, on May 9, 2012, Mr. Kennedy was charged by Indictment in Trial Court Case Number CR2012-240 with Attempted Capital Murder and Aggravated Assault of a Public Servant. (CR 6-7) All pleadings in CR2006-016 were adopted into CR2012-240. (Supp I CR(2012-240):8) (PT 8/27/12:23)

A trial was held in CR2012-240 on June 10, 2013-June 17, 2013. The jury found Mr. Kennedy guilty of Attempted Capital Murder. (CR 43) The jury imposed a sentence of sixty-five years imprisonment and no fine. (CR 49) The court imposed a sentence in accordance with the jury verdict. (CR 65-67)

On direct appeal, the Thirteenth Court of Appeals upheld the judgment and sentence in the case. See Kennedy v. State, 2015 WL 3637917 (Tex. App-Corpus Christi June 11, 2015)

APPEAL PROCESS

ISSUES PRESENTED AND COURT OPINIONS
(Relative to Petition For Writ Of Certiorari)

1) DIRECT APPEAL Case No. 13-13-00416-CR, Court of Appeals for the Thirteenth District of Texas, filed 3/7/14.

STATEMENT OF THE ISSUES

1) Whether, in a self defense case in which the State relies almost exclusively on the argument that the defendant provoked the victim's use of deadly force, the trial court errs in failing to define "provocation" for the jury.

The Court of Criminal Appeals has found the concept for provocation in the context of the legal defense of self-defense to be a "legal term of art" and this "legal term of art" differs from the dictionary definition of the term. As such, a trial court commits error when it fails to define the term in its instructions to the jury in accordance with the Code of Criminal Appeals' definition of that "legal term of art." Moreover, a non-legal, dictionary application of the term "provocation" could have lead a juror in this case to simply ask whether Mr. Kennedy "provided the stimulus for" Officer Kunz to

fire upon him when the term, used as a "legal term of art," required much more.

MEMORANDUM OPINION

On June 11, 2015 the Court delivered its Opinion, "We first observe that, because the legal definition of "provocation" was omitted from the jury charge, the jury's ability to conclude that Kennedy's actions were justified as self-defense was restricted. That is because the legal, technical definition of provocation is far more restrictive than common, dictionary meaning." Memorandum Opinion page 16, first para, L1-4.

"....the undisputed evidence showed that Kennedy fired forty-five rounds at Kunz, which strongly supports a conclusion that, by brandishing his weapon, Kennedy intended to establish a pretext to attackKunz. Accordingly, even if the jury had been instructed in accordance with Smith, it is overwhelmingly likely that it would have reached the same conclusion as to the self defense issue. Having reviewed the entire record, including the entire jury charge and arguments made by counsel, we conclude that Kennedy has not suffered any actual harm from the omission of his requested definition from the jury charge." Memorandum Opinion page 17, last line, P.18 para 1 and 2.

The Court's Opinion has decided unreasonably the important federal question of an apparent substantial guilt being used to nullify harm analysis. Due to the structure of Texas appellate law the Court's substantial guilt finding occurred without the Court's knowledge of the findings dependence upon an omission of duty by ineffective defense counsel making the opinion unreasonable and bringing it into conflict with relevant decisions of the Court. The Supreme Court has explained how this could happen in Texas:

> ..... This case regards a prisoner from Texas, where state procedural law does not require a defendant to raise his ineffective assistance-of-trial-counsel claim on collateral review. Rather, Texas law appears to permit a prisoner to raise such a claim on direct review, but the structure and design of the Texas system

make it virtually impossible for a prisoner to do so....."
See Trevino v. Thaler, 569 U.S. 413 (2013) 133 S.Ct. 1911
In Syllabus preceding Opinion of the Court, P.1, first para.
Held: Where, as here, a State's procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise an ineffective-assistance-of-trial-counsel claim on direct appeal, the exception recognized in Martinez applies. Pp.5-15. Trevino Syllabus dictum P.2 para. 2.
Held: (b) The difference between the Texas law-which in theory grants permission to bring an ineffective-assistance-of-trial-counsel claim on direct appeal but in practice denies a meaningful opportunity to do so - and the Arizona law at issue in Martinez - which required the claim to be raised in an initial collateral review proceeding - does not matter in respect to the application of Martinez. Pp. 8-14. Trevino Syllabus dictum P.2. section (b).

2) PETITION FOR DISCRETIONARY REVIEW From The Judgment Of The Texas Thirteenth Court Of Appeals. Filed on July 1, 2015 in the Texas Court Of Criminal Appeals, T.C.C.A., Case No. 13-13-00416-CR, PD-0803-15.

STATEMENT OF THE ISSUES

1) Trial Court failing to define "provocation" for the jury.

T.C.C.A. OPINION

On 5/29/2016 the Court ruled, "On this day, the Appellant's petition for discretionary review has been refused." No opinion or explanation was given, just a white post card.

3) In the Court of Criminal Appeals of Texas, Application For A Writ Of Habeas Corpus seeking relief from final felony conviction under Code of Criminal Procedure, Article 11.07, with Memorandum of Law in support. Filed 11/22/16

STATEMENT OF THE ISSUES

1) Whether defense counsel's failure to put on the promised ballistic shock incapacitation defense even though it was the obvious and only defense

to negate the apparent substantial guilt finding of excessive shooting which in turn nullified harm analysis and would have cost the defense no risk putting it on was an act of ineffective assistance of counsel which deprived Kennedy of putting on a complete defense and made the outcome of the trial unreliable.

T.C.C.A. OPINION

On 5/3/2017 The Texas Court Of Criminal Appeals issued a white post card stating: This is to advise that the Court has denied without written order the application for writ of Habeas Corpus. Kennedy, Michael Patrick T.Ct. No. Cr2012-240-2, WR-66, 179-06.

4) 28 U.S.C. §2254, No. 5:18-CV-00117-OLG-HJB United States District of Texas San Antonio Division, filed 2/9/2018

STATEMENT OF THE ISSUES

1) Whether, in a self defense case in which the State relies almost exclusively on the argument that the defendant provoked the victim's use of deadly force, the trial court errs in failing to define "provocation" for the jury.

2) Whether defense counsel's failure to put on the promised ballistic shock incapacitation defense even though it was the obvious and only defense to negate the apparent substantial guilt of excessive self defense and would have cost the defense no risk in putting it on was an act of ineffective assistance which deprived Kennedy of putting on a complete defense and made the outcome of the trial unreliable.

28 U.S.C. §2254 MEMORANDUM OPINION
Issued June 15, 2018

1) The Western Federal Court in its Memorandum Opinion and Order denied Kennedy's "Provocation" no jury instruction issue primarily by holding that 'No Harm' was done by the admitted error at Kennedy's trial due to

the overwhelming evidence of substantial guilt, mentioning specifically the 45 shots fired at Officer Kunz. This opinion by the Court was despite ineffective counsel having created by omission that "apparent' substantial guilt. By this opinion the court decided the important federal question of an 'apparent' substantial guilt being used to nullify harm analysis despite that finding's dependence upon ineffective Counsel's omission of duty.

2) The Western Federal Court in its analysis failed to review or even mention Kennedy's issue pertaining to counsel's failure to execute the promised ballistic shock incapacitation defense. This oversight was brought about by the unreasonable deference afforded defense counsel in the subordinate Article 11.07 District trial Court and adopted by the federal court. In response to Kennedy's ineffective assistance of counsel argument the Respondent quotes liberally from defense attorney Cantrell's affidavit in denying the ineffective assistance claim. The Affidavit containing perjuries and numerous contrived excuses rather than just distracting the court succeeded by excessive contrivance in derailing the judicial machinery of appellate review.

5) Appeal No. 18-50539, Application For Certificate Of Appealability In The United States Court Of Appeals For The Fifth Circuit New Orleans, Louisiana, filed 10/17/18.

STATEMENT OF THE ISSUES

1) Should a certificate of appealability issue for this Court to determine whether due process was violated when the trial court refused to define the term 'provocation' for the jury?

2) Should a certificate of appealability issue for this Court to determine whether the state court improperly denied the ineffective assistance of counsel claims without allowing Kennedy to make a full record?

FIFTH CIRCUIT COURT OF APPEALS'S 'ORDER'

ISSUED MAY 10, 2019

The Court restated 28 U.S.C. §2253 (c)(2) which Application had adhered to. Stated that Kennedy argues that the trial court's refusal to define the term 'provocation' violated his due process rights. Did not mention the ballistic shock incapacitation ineffective assistance of counsel issue whatsoever. Held: "Kennedy, however, has not made the showing necessary for a COA to issue. Accordingly COA motion is DENIED."

6) MOTIONS TO THE FIFTH CIRCUIT COURT OF APPEALS

Motion to withdraw Counsel and Request For Extention Of Time To File Pro Se Motion For Rehearing and Rehearing En Banc. Filed May 24, 2019.

FIFTH CIRCUIT COURT OF APPEALS MEMORANDUM

ISSUED MAY 28, 2019

Withdrawl of Counsel Granted. Extention of time for Pro Se Appellant to file a motion for reconsideration/petion for rehearing En Banc Granted. Due date June 7, 2019.

7) Pro Se Petition For Panel Rehearing FRAP 40, file stampted June 3, 2019.

FIFTH CIRCUIT COURT OF APPEALS MEMORANDUM

ISSUED JUNE 21, 2019

"IT IS ORDERED that the motion [panel rehearing] is DENIED."

REASONS FOR GRANTING THE PETITION

FIRST QUESTION

If defense counsel omits the necessary trial defense and thereby sustains a perception of substantial guilt so that the substantial guilt was dependent upon counsel's omission in order to survive, can that substantial guilt be used to dismiss ineffective assistance of counsel as harmless?

CONTEXT UNDERLYING QUESTION

The Western District of Texas Federal Court and the Fifth Circuit Court of Appeals have entered a decision in a way that conflicts with the decision of another Federal Court of Appeals and with this Court. Rule 10(a) Petitioner would show this case to be of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in the Court. 28 U.S.C. §2101 (e) The importance springs from long standing Federal Court and Supreme Court precedent being swept aside by findings of an [apparent] substantial guilt. The courts ruling has made no distinction between the [apparent] substantial guilt being dependent or independent of an act or omission made by an ineffectively assisting counsel, as if the distinction was of no consequence. Yet if the interpretation of the court is left standing it conflicts with decisions of this Court as set forth below.

CONTEXT OF THE ISSUE

The ballistic shock incapacitation defense testimony Kennedy's lawyer Mr. Cantrell, failed to present, would have, properly developed, been exculpatory. The Supreme Court has held, "Once a defendant introduces slight evidence of loss of capacity, the government must prove beyond a reasonable doubt that the accused had the capacity to conform his conduct to the law." U.S. Emery, 103 S.Ct. 469, 493. Once a defendant introduces evidence of insanity or INCAPACI-

TATION at the time of the offense was committed, the government then must prove the defendant had capacity at the time the offense was committed and must do so beyond a reasonable doubt. See U.S. Marbley, 410 F.2d 294. These two long standing, clearly established precedents were the first to conflict with and fall before the court's finding that [an apparent] overwhelming evidence of a defendant's substantial guilt is a finality which precludes consideration of Marbley, supra, or how ineffective counsel failure to develope the Emery/Marbley defense before the jury effected outcome.

A determining issue which the jury considered was that Kennedy did not put down his weapon when ordered to do so by Officer Kunz, but continued to fire. This would be the 45 shots fired into Officer Kunz's patrol car which the court found to be overwhelming evidence of substantial guilt. Had he been allowed, Kennedy would have testified that after being shot from behind, in the neck, not far below his brain stem, that he heard no commands nor comprehended rational thought process. With no alternate explanation provided by counsel the jury succumbed to the notion that Kennedy had transitioned from firing in self defense into the excessive firing of attempted murder. Had Lawyer Cantrell brought to trial an actual qualified ballistic shock incapacitation expert rather than the imposter Dr. Bailey and explained to the jury the scientifically justified alternative explanation to attempted murder was the ballistic shock reaction which temporarily incapacitated cognitive ability in Kennedy - then the reuslts of the proceeding would have been different. This was the nature of the ineffective assistance of counsel issue which was fully developed in Article 11.07 Memorandum of law in state habeas appeal and attached in full to Petitioner's Federal habeas appeal but was omitted from review, in part due to the issues' submersion, out of sight, behind an overwhelmingly contrived deferred to affidavit and partly by the court's determination that the over-

whelming evidence of substantial guilt nullified harm analysis of the ineffective assistance claim or that counsel omitted the incapacitation defense.

This finding that substantial guilt renders IAC harmless is in conflict with this court's holding in Williams v. Taylor, 529 U.S. 362, 390-91, S.Ct. 1495, 1511-12 (2000) which held that analysis of the prejudice prong of Strickland SHOULD FOCUS SOLELY on whether there was reasonable probability that but for counsel's errors, the results of the proceeding would have been different. (caps mine)

A determination of Kennedy's IAC issue can be derived in comparison to Gersten v. Senkowski, 426 F.3d 588 (2nd Cir. 2005). A case with matching relevant circumstances of ineffectiveness of counsel and a case also in conflict with the Kennedy's court's determination that [an apparent] substantial guilt nullifies harm analysis. In both Kennedy's and Gersten's cases it was deficient performance to fail to consult in preparation for trial and for cross-examination of prosecution's witnesses, any medical expert for Gersten (specific type injury to victim) and in Kennedy's effects of ballistic shock. Failure to bring such an expert was therefore not an objectively reasonable strategic choice. In Gersten, supra, the 2nd Circuit Court Of Appeals found counsel's failure to bring the expert witness an evident proof of ineffective assistence of counsel. However, the determination made in Kennedy's case would have us understand that the Court was wrong in its Gersten holding. That we should accept that because of overwhelming proof of the substantial guilt found in the physical signs of abuse in Gersten's victim that harm analysis of Gersten's attorney's ineffectiveness was not appropriate. The Gersten Court we are led to understand, was wrong to apply harm analysis to ineffective assistance of counsel under such circumstances.

The Court did not allow Gersten's attorney nor should they allow lawyer Cantrell to excuse the issue whenin fact they had no strategic plan but simply

failed to perform the duty required. Cantrell in an Affidavit claims unawareness of this ballistic shock incapacitation issue and if this were true then although Cantrell was ineffective for not providing the defense he would be even more ineffective by ignorance of the issue. This Court has held as far back as 1986 that toleration of tactical miscalculations is one thing; fabrication of tactical excuses is quite another. Kimmelman v. Morrison, 477 U.S. 365, 386-387, S.Ct. 2574, 2588-2589, (1986)

At issue, pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), is whether the state-court decision denying habeas relief was unreasonable. Indeed, a conscious and INFORMED decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness. Cantrell's lack of trial tactic cannot be said to be informed when he swears by Affidavit that he knew nothing about ballistic shock incapacitation and that it would have been moving in another direction anyway. That is not informed decision on trial tactics and strategy. To establich prejudice, a defendant is required to show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. Should this court be interested, the entire facts and process of this are presented in full within Kennedy's Article 11.07 Memorandum of Law and is within the Record as attachment to his 28 U.S.C. §2254 Petition and will not be stated redundantly herein.

In Strickland v. Washington (1984) 466 U.S. 668, 90L Ed 674, 104 S.Ct. 2052, the United States Supreme Court held that, to establish ineffectiveness, an accused must show (1) that counsel's performance was so deficient that counsel was not functioning as the counsel guaranteed by the Federal Constitution's Sixth Amendment, and (2) prejudice, by showing that there is a reasonable prob-

ability that but for counsel's unprofessional errors, the result of the proceeding would have been different. Under 28 U.S.C. §2254 (d)(1), a state prisoner's application for a writ of habeas corpus 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 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."

This Court refined it's Strickland holding in Williams v. Taylor, 529 U.S. 362, 390-91, S.Ct. 1495, 1511-12 (2000) holding that analysis of the prejudice prong of Strickland should focus solely on whether there was reasonable probability that but for counsel's errors, the results of the proceedings would have been different. The findings in Kennedy's state habeas claims resulted in a decision that was "contrary to and involving an unreasonable application of clearly established Federal Law as determined by the Supreme Court in Williams v. Taylor, supra. The conflict arises by the court dismissing consideration of whether the results of the proceedings would have been different but for counsel's errors and considers as primary issue whether there appears to be substantial guilt enough to allow dismissal of harm analysis but at the same time ignoring whether such guilt finding was dependent upon or independent of ineffective counsel's errors.

The law-of-the-case doctrine generally precludes reexamination of issues of law or fact decided on appeal. The doctrine is premised on the salutary public policy that litigation should come to an end. And this would be fair enough if the substantial guilt finding which brings litigation to an end was not effected whatsoever by ineffective acts or omissions of counsel such that the substantial guilt finding stands independent of counsel's errors. In instant case it does not.

In deluce v. Lord, 77 F.3d 578, 590 (2nd Cir. 1996) the Court held that

counsel's failure to pursue extreme emotional disturbance defense constituted ineffective assistance when a reasonable probability existed that a jury would have found the defense persuasive. Kennedy's ballistic shock cognitive incapacitation caused a disturbance which far exceeded the less stringent 'disturbance' standard set out in Deluce. Trial Judge Robison who recommended dismissal of the Article 11.07 petition by hiding behind a smoke screen of Affidavit deference and unreasonable substantial guilt finding. Robison pretended even to not recall at his own presiding trial when Cantrell began grilling Officer Kunz on ballistic shock how Robison ordered Cantrell to desist the line of questioning and to put on his own expert. Or when Cantrell questioned Dr. Bailey about ballistic shock, how Bailey was revealed as no expert by the prosecutor and was admonished by Robison. See RRV:6, P164, L7-8, RR:V6, P180, L18-19. THE COURT: "sustained, he has not been qualified as a ballistics expert."

IN Prou v. United States, 199 F.3d 37, 48 (1st Cir. 1999) The Prou Court held "An attorney fails to raise an important, obvious defense without any imaginable strategic tactical reason for the omission, his performance falls below the standard of proficient representation that the Constitution demands." By the Prou standard, because the ballistic shock incapacitation defense was a clear winner and presenting it would have risked nothing, counsel's eschewal of it amounted to deficient performance. In Prou, supra, section IV (B) the Court turned tothe matter of prejudice.

> which in this context means "a (199 F.3d 49) reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. For this purpose. "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." id. but "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case." id.

Again, as with the other case law cited above, Prou analysis applied to Kennedy failed under the weight of an [apparent] substantial guilt which existed only by ineffective counsel's failure to annihilate it.

Nor did the Courts get past their unreasonable bulwark of substantial guilt and untested deference to ineffective counsel's contrived affidavit to evaluate harm in defense lawyer Cantrell's double pronged ineffectiveness: The first being his failure to present to the jury, with a qualified expert,the ballistic incapacitation testimony. The second was that his fraudulent assurances that he would present such testimony insidiously placed defendant request for competent Counsel F. Clinton Broden, to perform said duty, into abeyance. Cantrell both failed to perform and blocked any trial performance whatsoever, and this deprived defendant of opportunity to present a complete defense. Kennedy's defense rested upon two pillars: 1) who shot first/provocation and 2) why did Kennedy's self defense transition into 45 shots fired into Officer Kunz's patrol car? Broden was hired to perform pillar 1 and Cantrell pillar 2 and although Broden was lead counsel in the trial courtroom, pillar 2 was Cantrell's duty.

As shown, United States Court of Appeals have entered decisions in conflict with the decisions of other United States Court of Appeals on the same important matter and has also conflicted with holdings of the Court. This Court should resolve those conflicts by determining the important Federal question of ineffective counsel, by his errors, sustaining a finding of substantial guilt, followed by ineffective assistance of counsel being found harmless due to that finding of substantial guilt.

SECOND QUESTION

Was due process violated when the trial court refused to define the term provocation for the jury?

CONTEXT UNDERLYING QUESTION

The court of appeals analyzed the error of not defining 'provocation' for the jury to determine if Kennedy suffered "some harm." It noted that the omission restricted the jury's ability to find self-defense because the legal definition was more narrow than the one found in a dictionary. Given that in trials state to state, district court to district court jury instructions on the term of art 'provocation' in self-defense cases remain perpetually in variance one from the other it is of imperative public importance for this Court to create a controlling opinion.

CONTEXT OF THE ISSUE

DUE PROCESS WAS VIOLATED WHEN THE TRIAL COURT REFUSED TO DEFINE THE TERM PROVOCATION FOR THE JURY.

This ground was raised on direct appeal to the Thirteenth District Court Of Appeals. Since issues raised and rejected on direct appeal in Texas cannot be reconsidered on an Application for Writ of Habeas Corpus Under Art. 11.07, this ground has been exhausted in state court.

The positions of the party in this case were easily discernable. Kennedy argued that Officer Kunz fired on him first and that, when he returned fire, he was merely defending himself. (RRVI:61-65). The State argued that Kennedy pointed a gun at Officer Kunz first and thus it was irrelevant whether Officer Kunz fired first because Kennedy "provoked" the attack.

> [T]his man provoked the situation, that is he is the one who started it when he pointed that gun at Officer Kunz.
>
> [W]ho shot first in this case is about as important as what type of car the defendant was driving that night. Okay? It is not important because

> the moment that the defendant picked up a firearm and pointed it at a police officer, he forfeited the right to claim self-defense.
>
> When you go back there, I ask that you find the defendant guilty of attempted capital murder because when you pull a gun on a police officer, you do not get to claim self-defense. You have provoked the event. (RRVI:55, 79, 95).

Kennedy requested that the trial court define the concept of provocation in the jury charge and requested that the jury be charged: "Provocation is defined as, one, that the defendant did some act or used some words which provoked the act on him... Two, that such acts or words were reasonable calculated to provoke the attack, and three, that the act was done or words were used for purpose and with the intent that the defendant would have a pretext for inflicting harm upon others." (RRVI:20-21)[1] Kennedy explained that, without the definition, the jury might believe that he acted recklessly in allegedly pointing a gun at Officer Kunz without having intended to cause a pretext for inflicting harm on Officer Kunz or others and still be required to find him guilty under the court's instructions. (RRVI:12). The court responded that the State could argue that Kennedy allegedly pointed the gun at Officer Kunz to create a "suicide by cop" situation and denied Kennedy's requested instruction. (RRVI:12,21).[2]

The Court of Criminal Appeals has held that terms which have a technical legal meaning may need to be defined in the jury charge. Middleton v. State, 125 S.W.3d 450, 454 (Tex.Crim.App. 2003). "This is particularly true when there is a risk that the jurors may arbitrarily apply their own personal definitions of the term or where a definition of the term is required to assure a fair understanding of the evidence." Id. (citations omitted).[3] Likewise, "a trial court's

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[1] Kennedy explained that he took the definition of provocation directly from the Court of Criminal Appeals' decision in Smith v. State, 965 S.W.2d 509 (Tex. Crim.App. 1998)(RRVI:19).

[2] The State never argued the "suicide by cop" theory and, in any event, the

charge should contain a definition of any legal phrase that the jury necessarily will use in properly resolving that issue." Hudson v. State, 179 S.W. 3d 731, 739 (Tex.App.Houston [14th Dist.] 2009).[4]

The dictionary definition of the word "provoke" is, inter.alia., "to provide the needed stimulus for."[5] Nevertheless, "[t]he phrase 'provoking the difficulty' is a legal term of art,..." Smith, 965 S.W.2d at 512 (emphasis added). The rule of law is that if the defendant provoked another to make an attack on him, so that the defendant would have a pretext for killing the other under the guise of self-defense, the defendant forfeits his right of self-defense." Id. Indeed, "[e]ven if a defendant acts wrongly and provokes an attack by another, he will not lose his right to self-defense if he did 'no[t] inten[d] that the act would have such an effect as a party of a larger plan' of harming the victim." Cherry v. State, 2014 WL 265844 *5 (Tex.App.-Houston

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jury would still have had to determine whether it was a valid theory and whether Kennedy pointed the gun at Officer Kunz in order to "have a pretext for inflicting harm upon others." Indeed, even accepting a theory of "Suicide by cop" would not, ipso facto, mean that Kennedy intended to inflict harm on Officer Kunz or others.

[3]See also Medford v. State, 13 S.W.3d 769, 772 (Tex.Crim.App. 2000) ("Justice would be better served, and more consistently applied, if jurors were provuded a precise, uniform definition to guide their determination whether the particular circumstances at issue constituted a completed arrest..").

[4]See, Curry v. State, ___S.W.3d___, No. AP-77,033, 2017 WL 825251 (Tex.Crim. App. 2017), Judge Alcala dissenting (failure to define term society is violative of due process).

[5]www.merriam-webster.com/dictionary/provoke.

[1st Dist.] 2014) [unpublished], citing Smith, 965 S.W.2d at 518.

Given this legal term of art, "provocation" should have been defined for the jury in this case. Whereas, a non-legal, dictionary application of the term "provocation" could lead a juror to simply asking whether Kennedy "provided the stimulus for" Officer Kunz to fire upon him first, the "legal term of art" required much more. It required a jury to conclude, beyond a reasonable doubt, that, even if Kennedy did point a gun at Officer Kunz when Officer Kunz was beside his car window, Kennedy did so with the intent to have a pretext for harming Officer Kunz.[6]

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[6]Federal courts have found the failure to define terms with a commonly understood meaning does not constitute a due process violation. See Woods v. Johnson, 75 F.3d 1017, 1034 (5th Cir. 1966). Provocation is not a term with a commonly understood meaning. Moreover, a faulty jury instruction will constitute a violation of due process where the "instruction by itself so infected the entire trial that the resulting conviction violates due process." Estelle v. McGuire, 502 U.S. 62, 71-72 (1991). Here, the meaning of provocation was so key to the correct outcome of the trial that the failure of the trial court to define the term violates due process.

THIRD QUESTION

Whether law enforcement's withholding of prescription pain medication during trial in order to force a mistrial or drive defendant from the witness stand violates a defendant's rights to a fair trial or due process?

CONTEXT UNDERLYING QUESTION

For this Court to determine if the State can use pain infliction upon a defendant standing trial in order to provoke a mistrial or drive the defendant from the witness stand is of imperative public importance and justifies the Court to exercise its supervisory power and issue an Opinion on this matter.

CONTEXT OF THE ISSUE

The defendant received seven gunshot injuries from Officer Kunz. See Art. 11.07 Memorandum Of Law, Ground No. Nine, pg. 36-47. The State prevented defendant from obtaining treatment in several ways. See Art. 11.07 Memorandum Of Law, Ground No. nine, pg. 36-47. Defendant was dependent upon his prescription pain medication to function at a bare minimum adequacy during his criminal trial proceedings and for this reason the State denied that medication during criminal trial. Pain destroyed defendant's ability to sustain concentration, negatively affected demeanor and posture and this prevented defendant's testimony at trial. See Art. 11.07 Memorandum of Law, Ground No. Nine, pg. 36-47.

The 28 U.S.C. §2254 Court states that "Furthermore, the state court's denial of this claim was not an unreasonable determination of the facts in light of the evidence presented in the state proceedings."

The §2254 Court is mistaken regarding a resolving degree of review of the matter in state appeal courts. The fact finding state court's Order Recom

-mending Denial of Art. 11.07 Writ Application made no mention of this properly presented ground. The State's Answer in Opposition To Application For Writ of Habeas Corpus mentions the withholding of prescription Pain medication ground in two sentences. The first, pg. 26, No. 8, "Cantrell refutes Applicant's claims, asserting that he in fact made arrangements so that Applicant could sit comfortably during trial and bring legal papers to and from the Trial Court." And second, pg. 28, first paragraph refers to Cantrell's affidavit, "Affidavit at 1. Notably, despite the fact that the Trial Court went out of its way to accommodate Applicant's requests - providing a cot and allowing Applicant to stand - Applicant apparently never brough his complained-of-issues to his "competent" counsel Broden's attention, nor does he complain of Broden's failure to rectify the situation."

As is documented in Art. 11.07 Memorandum Of Law, Ground No. nine, Counselor Broden was located hundreds of miles north of the jail/trial venue. Lawyer Cantrell was hired representing himself as being highly respected and effective local attorney who had connections both in the Comal County Jail and the District Attorney's Office and he would insure Kennedy received proper medical treatment before trial commenced and receive proper pain medication both prior to and during trial. He repeatedly stated he was about to hold a hearing with the judge on the issue and meet with high ranking jail officers to handle the issue. Each hearing date he made excuses and set new hearing dates then more excuses, more dates. At trial he continued his pattern and repeatedly assured defendant he was about to ask the trial judge for a ruling and an order to get the medication at the next break, then the next break after that. At the right moment he claimed during trial he would do it. But he only delayed and prevaricated while claiming defendant should just wait for the next break - but even with Cantrell being Cantrell with contrivances and excuses it remains the case that the State initiated and enforced the

withholding of the prescription pain medication. Ineffective counsel's failures only exasperated a deprivation forced upon defendant at trial by the state. It was the State's intent, execution and purpose to provoke a mistrial or drive defendant from the witness stand and although Cantrell's promises and assurances that he was an attorney and should be trusted, and was handling the problem but did not, compounded the issue it did not create nor inflict it by power of the state upon defendant.

Regardless of inadequacy of state review the §2254 Court's review of this ground came down to this summation:

> The state court's denial of this claim was not an unreasonable application of clearly established federal law, as Petitioner cites to no Supreme Court opinion holding that law enforcement's withholding of [prescription pain] medication during trial violates a defendant's rights to a fair trial or due process; neither Harper nor Riggins are on point, as Petitioner was not medicated against his will.

The §2254 Court's quotation seems to invite the Supreme Court to review the case and issue an opinion which is consistent with understanding that the Court recognized that the issue is of such imperative public importance as to justify this Court's exercise of its supervisory power.

FOURTH QUESTION

When an unreasonable deference to accused ineffective counsel's prima facie perjurious, sworn affidavit yields an unreasonable set of fact findings which are directly causal to dismissal of the habeas corpus appeal has due process been violated?

CONTEXT OF THE QUESTION

Petitioner would show that the state appeal court and the federal 28 U.S.C. §2254 Court by adoption have entered a decision which conflicts with long held, clearly established law. Further, he would show that this case is of such imperative public importance as to justify deviation from normal appellate practice and require immediate determination in the Court. Petitioner asks not review of specific facts but review of a process which is unconstitutionally vague. Petitioner's appellate courts have found that 'deference' itself was proof of an affiant's veracity. Not just in cases of genuinely ambiguity or interpretation but in every instance and without limit. This unreasonable application of deference generated unreasonable findings of fact and an unreasonable dismissal of a habeas corpus petition as untruthful, knowingly making false statements, unreliable and committing of perjury. The court's substituting absolute deference for actual fact finding states a conflict betwee fair administration of law in accordance with established procedures and with due regard for the fundamental rights embodied in the Fifth and Fourteenth Amendment to the United States Constitution and the unreasonable application of deference.

State habeas courts credibility MADE ON THE BASIS OF CONFLICTING EVIDENCE [only] are entitled to strong presumption of correctness and are 'virtually unreviewable' by federal courts. (emphasis mine) See Moore v. Johnson, 194 F.3d 586, 605 (5th Cir. 1999) The question before this Court is not to implicate credibility determinations made on the basis of conflicting evidence but to set limits on the process itself which relies upon application of deference

while ignoring valuation of conflicting evidence.

This case under 28 U.S.C. §2254 (d)(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in state court proceedings. The evidence was facts and citations to the Reporters Record which were sworn to be correct, under penalty of perjury, by the Appellant and were ignored as weightless against limitless deference.

This case is a subspecies of the deference issue case, Kisor v. Wilkie, 588 U.S. ___(2019). Justice Kagan announced the judgment of the Court and delivered the Opinion of the Court with respect to Parts I, II-B and IV, and an Opinion with respect to Parts II-A, in which Justice Ginsburg, Justice Breyer, and Justice Sotomayor joined. It is of public importance that the limiting criterion resolved by the Court in Kisor v. Wilkie be further adapted to encompass the array of criminal appeal case fact finding considerations. The Court noted in Kisor that it has often deferred to agencies' reasonable reading of a genuinely ambiguous regulations. The Court calls that practice Auer deference and ruled not to discard that deference they gave the agencies. The Court held,

> ....But even as we uphold it [deference], we reinforce its limits. Auer deference is sometimes appropriate and sometimes not. Whether to apply it depends on a range of considerations that we have noted now and again, but compile and further develop today. The deference doctrine we describe is potent in its place, but cabined in its scope.....

CONTEXT OF ISSUE

Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) Congress intended for the courts to defer in matters of ineffective assistance of counsel to counsel's actual or invented claims of error was trial strategy as an escape from harm analysis. Over time this routinely used stratagem ubiquitously transformed into an absolute deference to to all facts and positions presented in state opposition briefs or ineffective counsel's affidavit. This

lack of limitations to 'deference' applied to criminal appeal factual determinations speaks to a broad range of perplexities:

1) Is the appellate reviewing court free from making an independent inquiry into whether the character and context of the deferred to position entitles it to controlling weight?
2) Should the reviewing court decline to defer, for example, to a transparently 'convenient litigating position' supported by contrived excuses?
3) Should the reviewing court presume that the AEDPA Congress did not want reviewing courts to interpret deference for reasonableness?
4) To what degree is unreasonable deference to an ineffective counsel's affidavit allowed to cause a structural framework appellate review failure?

The record demonstrates that criminal fact finding courts unlawfully mission creep application of the deference standard from the AEDPA Congress's intended domain of excusing ineffective assistance of counsel, by claiming error was part of trial strategy, into excusing ineffective assistance despite clear and convincing evidence of failure to perform duty. To example deference suchly unreasonably applied consider the first paragraph, first page of the fact finding trial court's Order Recommending Denial of Art. 11.07 Writ Application. The fact finding Court, thereat, gave unreasonable absolute deference to the State's Answer and Arguments, adopting all its findings of fact, which were themselves adopted in total from ineffective counsel's perjurious affidavit. The fact finding court, to protect its docket from hearings and retrials, then unreasonably did no authentic fact finding of its own. Then the Texas Court of Criminal Appeals adopted that adoption of an adoption by white card, followed by the Federal 28 U.S.C. §2254 Court adopting the adopted, adopted, adopted findings - so that all appellate review fact finding were based entirely upon an affidavit shown to be filled with perjury and contrivance.

The Kisor Court, in like circumstances, certainly would have cabined Auer's scope in varied and critical ways. See Kisor v. Wilkie, 588 U.S. ___ (2019), Auer v. Robbins, 519 U.S. 452 (1997).

The presently established continuum of deference based adoptions effectively curtails due process appellate review. Example instant case, ineffective counsel failed to put on ballistic shock incapacitation defense at guilt innocence phase of the trial.[1] Then, when it was too late to produce acquital, counsel attempted to put it on in incompetent, non-expert way at the punishment phase of the trial. Petitioner cited these attempts that counsel knew of the ballistic shock incapacitation defense and failed to perform duty in the appellate record.[2] Despite these proofs within the Reporter Record Transcipts the State Answer in Opposition,[3] fact finding trial judge,[4] and the Federal 28 U.S.C. §2254 Court[5] acknowledged no such records existed, while simultaneously finding petitioner was making false statements and had lost his credibility.

This court should determine, when the weight of evidence clearly supports an appellant's claims is it reasonable, absent qualifying circumstance, for ineffective counsel's claims to be accepted by only weight of deference? And, when petitioner does rebut the findings of fact through clear and convincing evidence is it reasonable for the fact finding court to use deference to discharge that rebuttal?

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[1] See State Answer In Opposition page 8, L2, citing Affidavit at 2-3. "Dr. Bailey did not testify until the punishment phase, after the guilt/innocence phase was over."

[2] Rather than provide expert, exonerating ballistic shock incapacitation testimony Cantrell and Bailey provided vague, unscientific, ineffectual, non-expert testimony which at times was childish and then in his Affidavit denied it all.

a) Cantrell grasps at ballistic shock concept asking Dr. Bailey "....that bullet travels in a very fast speed and can create a great impact in someones body. Would you agree or not agree?" (RRVI:180, L9-10) Bailey answers, "I would agree." (RRVI:180)

Footnotes continuation.

b) Cantrell asks, "Would you agree that maybe a bullet, a .40 caliber bullet could travel as high as 200 feet per second..." (RRVI:180) As cited in Art. 11.07 Memorandum pg. 24, at (2)(b) bullet velocity is approximately 1,142 fps and shockwave velocity in the neck close to that of sound in water, 1,460 m/s. (11.07 Memorandum pg. 25, first paragraph. Citing (ex. S2:295)

c) Cantrell asks, "Does a bullet, after it hits a body, create a great impact in someone's body?" (RRVI:180, L20-21) As cited in the Memorandum the velocity of (fps) 1142, E(ft-lbs) 449, PSI max. impact 714 would have been cognitively incapacitating on a gradient to total. See Memorandum pg. 25, (2)(c) citing (ex. M3:11)

d) Cantrell asks, "... it is a tiny bullet, but can create a huge force within the body. Correct or not?" (RRVI:180)
Bailey answers, "That's correct." (RRVI:181, L1)

e) Cantrell asks, "Creates a lot of damage?" (RRVI:181)
Bailey answers, "That's also correct." (RRVI:181)

f) Cantrell asks non-expert Dr. Bailey, ".... could you give a good description, and TRY TO MAKE IT AS BEST YOU CAN WITHOUT GETTING VERY SCIENTIFIC - what a body might so." (RRVI:181, L20-22) Recall that Bailey was hired to provide scientific testimony.

Cantrell's and Dr. Bailey's presentation of ballistic shock incapacitation to the jury made no distinction whatsoever between the vastly disparate physiological affects of body as opposed to actual brain gunshot shock trauma. They paint the unscientific picture that all gunshot impacts are created equal and whether brain or lower body is shocked by ballistic force it makes no difference in determining the gunshot victim's mental state outcome. (RRVI:181, L4-25)

Footnotes continuation.

2.1 Lawyer Cantrell improperly solicited ballistic shock expert testimony from Officer Kunz, asking him these questions:

a) "And that type of bullet comes out of a gun at a very fast pace and as it enters into somebody's body, it does a lot of damage, doesn't it?" (RRVI:126, L15-17)

b) "Would you agree with me that when someone is shot by a .40 caliber weapon, it creates a lot of damage? It enters someone's body, it creates a lot of force and causes injury?" (RRVI:127, L17-20)

c) "Okay. Would you agree with me that when you are shot, that it causes injury? So when someone is shot, they are injured. You will agree with me? (RRVI:129, L12-30)

d) "And depending on where someone is shot, and where it hits the body, that can be either severe or minor? (RRVI:130, L6-8)

2.2 Trial Prosecutor Kelly, who also wrote the State's Answer in Opposition that Cantell didn't know of and didn't attempt at trial, objects to ballistic shock incapacitation testimony being solicited from Officer Kunz.

a) Prosecutor Kelly, "It is not relevant testimony.", "No it is not, not from this witness." (Indicating that Officer Kunz is not a ballistic shock incapacitation expert)

2.3 Trial Judge Robison, who was also the Art. 11.07 fact finding recommeding Art. 11.07 habeas Judge who found that Applicants averring that Cantrell represented that Dr. Bailey was a ballistic shock expert was an "OUTRAGEOUS DECEIT" See (Order Recommending Denial of Art. 11.07 Writ Application at pg. 2 (7)(c)) then advises Cantrell to stop questioning Officer Kunz about balistic shock,

a) Judge Robison, "You can put on your own witness on ..." (RRVI:131-132)

b) Judge Robison then sums up Cantrell's ballistic shock incapacitation

Footnotes continuation.

defense "Well, what are you trying to do?" and "It doesn't seem like it makes any sense at all." (RRVI:132)

3 "Although Applicant's claims fail on the merits, Applicant's submission of false evidence in support of his Application constitutes an abuse of the writ process." See State's Answer in Opposition pg. 9, last 3 lines.

4 "Applicant claimed the use of Dr. Bailey nulified [sic] [Applicant's] self-defense claim ... [denying him] his opportunity to put on a complete defense." See fact finding trial court Judge Robison in his Order Recommending Denial of Art. 11.07 Writ Application pg. 2, (7)(b).

a) For Petitioner's citing of Cantrell's ineffective ballistic shock incapacitation failures within the transcript records Judge Robison finds, "This Court finds that Applicant and his claims are not credible." See Order Recommending Denial, pg. 1, at Fact Finding (1).

b) Judge Robison, "Moreover, this Court has found that at the time he presented the application, Applicant knowingly made false assertions in support of said application." This is deference in its most distilled potency. See Order Recommending Denial at Conclusion of Law pg. 3, (2).

5 The Court's comment on Dr. Bailey is found in Memorandum and Opinion Document No. 11, pg. 13, second paragraph. "With regard to the testimony of Dr. Bailey in his affidavit defense counsel noted Dr. Bailey testified only at the punishment phase of the trial and, accordingly, any assertion that Dr. Bailey's testimony affected the outcome of Petitioner's trial on his guilt innocence is incorrect, (ECF No. 7-46 at 112-13) (The jury had already reached a guilty verdict before Dr. Bailey testified.") ... The Court seems to ignore that

DEFERENCE V. REPORTER'S RECORD

To what degree does deference allow an appellant to cite the Reporter's Record Transcripts without being accused of perjury?

To what degree is deference allowed to absolve a contradiction between the ineffective counsel's affidavit and the evidence?

To what degree does deference license ineffective counsel to aver[7] and the fact finding judge to adopt that actual trial testimony cited in the Reporter's Record Transcripts by volume, page and line numbers[8] does not exist[9] and that by citing the testimony an appellant knowingly made false assertions, abused the writ process and may be subject to perjury prosecution[10], and deference carried further into the federal 28 U.S.C. §2254 Memorandum Opinion and Order[11] to, by deference adoption, determine a petitioner's unreliability?

Footnotes

Petitioner's entire ineffective assistance of counsel ballistic shock incapacitation claim is that Cantrell presented the defense in incompetent, non-expert way and failed to present the defense at the guilt innocence phase of the trial, where it should have been presented.

6) In response to Petitioner citing the record showing Cantrell was aware but non-expertly and in the wrong part of the trial, in several different instances, attempted to insinuate the ballistic shock incapacitation defense, Prosecuter Kelly states, "MR. CANTRELL'S AFFIDAVIT SHOWS THAT APPLICANT HAS SUBMITTED FALSE EVIDENCE IN SUPPORT OF HIS APPLICATION, HAS WAIVED AND ABANDONDED ANY CLAIM TO RELIEF, AND MAY BE SUBJECT TO A PERJURY CONVICTION. (highlights hers) See Answer in Opposition pg. 7, at III.

7) Cantrell swearing by affidavit, "If anything, Dr. Bailey's testimony was the only mitigating evidence for Mr. Kennedy, SINCE NONE OF HIS RELATIVES WERE WILLING TO TESTIFY ON MR. KENNEDY'S BEHALF." See Affidavit in Response to

DEFERENCE TO CONTRIVANCES: CAUSING DISTRACTIONS

Under protection of the deference standard do limits exist on ineffective counsel's affidavit's use of serial contrivances? Petitioner's Ground No. 9, pg. 14, No. 1, of Art. 11.07 habeas corpus appeal stated:

On the first day of trial the state did not allow defendant to

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Footnotes continuation

to writ of Habeas Corpus, pg. 5, ground No. 5, last two lines.

8) See fourteen pages of Petitioner's relative (sister) testifying on Mr. Kennedy's behalf. (RRV:6 pg. 136-150)

9-10) Deference then converts Cantrell's false statement that Kennedy's relatives would not testify for him into perjury committed by Petitioner.

a) The Court, "This Court finds that Applicant and his claims are not credible." See Order Recommending Denial of Art. 11.07 Writ Application, pg. 1, (1).

b) The Court, "This Court finds Mr. Cantrell and his Affidavit - signed on December 7, 2016 - to be credible." See pg. 3, (7) of Order Recommending Denial of Art. 11.07 Writ Application. The Court found, ".... Applicant knowingly made false assertions in support of said application." "This Court therefore concludes that Applicant has abused the writ process, and accordingly recommends citing Applicant for Abuse of the Great Writ. See pg. 3, (2). "Applicant may be subject to a perjury prosecution and stacked sentence for such assertions." See pg. 3, (2).

11 "Furthermore, counsel averred: 'If anything, Dr. Bailey's testimony was the only mitigating evidence for Mr. Kennedy, since none of his relatives were willing to testify on Mr. Kennedy's behalf.'" 28 U.S.C. §2254 Memorandum Opinion and Order, Doc. No. 11, pg. 13, 3rd para. Quoting ECF No. 7-46 at 113-14.

> carry anything to the trial court. This included his reading glasses. Defendant Kennedy was dependent upon his reading glasses to assess the voir dire jury questionairs and to take notes and review each and every prospective juror and to keep track of them in the determination of selection. Defendant was thus deprived of his right to fully participate in the jury voir dire process which was his right.

Consider an example of perfectly acceptable contrivance by affiant. Cantrell's affidavit pg. 5, Ground nine states "Mr. Cantrell always carries multiple sets of reading glasses and would have gladly loaned a pair had this been requested." The fact finding court applys deference and simply accepts the contrivance that ineffective counsel always carries multiple sets of reading glasses on his person at all times. And by this deference to contrivance is distracted from further fact finding on the issue.

It should be set by this Court that a fact finding review court should decline to defer, for example, to a merely "convenient litigating position", such as a lawyer going through life with always a pocket full of reading glasses. Concept borrowed from Kizor syllabus pg. 2, paragraph 3, citing Christopher, 567 U.S., at 155.

DEFERENCE USED TO SOW CONFUSION

Should the State's Answer in Opposition be permitted to rely upon deference from the fact finding court to sow confusion as a means to avoid fact finding the issue?

The State's Answer in Opposition to Application For Writ of Habeas Corpus pg. 15, is but one example of many throughout the State's Answer in Opposition of how through deference Applicant's Art. 11.07 statements are allowed to be intentionally misread and misinterpreted by the state. The state repeatedly misconstrues and misrepresents petitioner's statements in order to answer not to the facts stated but to distraction tangents springing off of petitioners

actual statement of fact. See pg. 15 State Answer in Opposition, "At the outset, it appears Applicant is confused about his second trial. See application Art. 11.07 Memorandum of Law Ground No. 1, at (1), pg. 6. The Honorable Gary Steel did not preside over his second trial (see, e.g. II R.R. at 1) This Court presided." Applicant, however, never claimed that Steel presided over his second trial, he claimed that Steel presided over defendant Kennedy's pre-trial motions hearing and that Cantrell then intentionally prevented Trial Judge Robison from reviewing Steel's 'binding' pre-trial order to hold ready for use at trial the seized weapons which was ordered (ORDERED AND DECREED) by the Superior Third Court of Appeals NOT TO BE USED at Kennedy's remanded Criminal trial. This sowing of confusion - deflection from the issue, by the State is a pattern repeated throughout its Answer in Opposition and succeeded only due to the fact finding court not finding facts but rather simply defering to whatsoever the State claimed in Opposition. This distraction caused the issue of threatening defendant with use of illegal evidence if he testified at trial from being appellate court reviewed.

DEFERENCE TO QUOTES ALTERED BY THE STATE

To what degree does deference to the State's Answer in Opposition allow the fact finding judge to allow verbatim quotes from Appellant's petition to be altered by the State? When the fact finding court defers to claims made in Opposition which leads to impeachment of a statement attributed to appellant, need he have made the statement?

When, under protection of deference, within the ECF, the State Answer in Opposition amends a direct quote from appellant's habeas petition[1], in order that the alteration to the Electronic Case File (ECF) No. 7-46 makes the quote false[2], was it reasonable that Petitioner's CREDIBILITY WAS UNDERMINED by the false quote?[3] And is it reasonable on the basis of altered Petitioner's statement in ECF No. 7 for the Memorandum Opinion and Order to specify that ECF No.

was part of the record considered in the denial of the petition and denial of certificate of appealability as well?[4]

Footnotes

[1] To quote Petitioner by what he actually wrote see Art. 11.07 Ground No. 11, pg. 14. Petitioner refers to attorney Cantrell coming to the JAIL, in pre-trial ATTORNEY-CLIENT MEETING. At these Attorney-Client meetings Cantrell would sometimes be incoherent, unable to recall important information, disheveled, glassy staring eyes, unable to recall what had just been discussed and agreed upon at Attorney-Client [jail] meeting.

[2-3] See Memorandum Opinion and Order of Federal Court, Document 11, page 15 first paragraph, "The trial court noted Petitioner's credibility was undermined by his assertion that Mr. Cantrell was 'mentally incapacitated by apparent chemical substance abuse,' and that Mr. Cantrell "appear[ed] unkempt, disheveled, with glassy, vacantly staring eyes" and was INCOHERENT AT TRIAL. (Citing ECF No. 7-46) "AT TRIAL" was added by the Opposition to make ECF No. 7 false.)

[4] See Memorandum Opinion and Order page No. 1 "Having considered the Petition, the record [ECF-7-46], and applicable law, the Court finds the petition should be denied. Petitioner is also denied a certificate of appealability.

IMPERATIVE PUBLIC IMPORTANCE JUSTIFIES THE SUPREME COURT TO ADAPT KISOR V. WILKIE FRAMEWORK TO LIMIT MISAPPLICATION OF CRIMINAL APPELLATE DEFERENCE

Just as this Supreme Court fixxed the deference issue pertaining to government agencies' reasonable reading of regulations it should fix the criminal appeal deference unreasonable application issue. This Court has already done the heavy lifting in Kisor v. Wilkie, 588 U.S. ___(2019), requiring now only conversion of Kisor into criminal circumstances rather than creation. Consider as example in Kisor v. Wilkie pg. 40, second paragraph could be an apt conversion to appellate deference, plagiarized and adapted herein from Justice Gorsuch's concurring judgment:

> Fifth, Auer has generated no serious reliance interests. The only parties that might have relied on Auer's promise of deference are the ineffective attornies that use post hoc interpretations to bypass the appellate fact finding procedures. But this Court has never suggested that the convenience of ineffective attornies should count in the balance of stare decisis, especially when weighed against the interests of citizens in a fair hearing before an independent judge and knowable set laws. In short, "'[T]he fact that ineffective attornies may view [Auer deference] as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest'" of all citizens "'in having their constitutional rights fully protected.'"

Justice Kagan, Opinion of the Court, pg. 1, could with [..] adaption cover criminal appeal deference also, "But even as we uphold it, we reinforce its limits. Auer deference is sometimes appropriate and sometimes not."

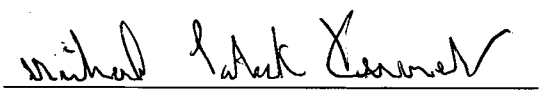
The Kisor syllabus pg. 2, paragraph No. 3 could convert to cover criminal appellate deference as such, 'Rather, a court must also make an independent inquiry into whether the character and context of the [ineffective counsel's claimed facts] entitles it to controlling weight.'

Justice Kagan, Opinion of the Court, pg. 13, paragraph No. 2 "First and foremost, a court should not afford Auer deference unless the regulation [fact finding] is genuinely ambiguous.....((deferring only 'if the meaning of the words [interpretation of the facts] used is in doubt'").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: September 6, 2019