ORIGINAL

No. 19-6346

FILED
AUG 26 2019
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

Paul Malone — PETITIONER
(Your Name)

vs.

Lorie Davis — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

Paul Malone TDCJ# 01823746
(Your Name)

Michael Unit 2664 FM 2054
(Address)

Tennessee Colony, TX 75886-0000
(City, State, Zip Code)

n/a
(Phone Number)

QUESTIONS PRESENTED

1. Does deference provided from AEDPA and Strickland v Washington, 466 US 668 (1984) apply when there is evidence of trial attorney perjury before the court?

2. Does refusal of trial attorney to investigate four mental disorders of petitioner before trial equate to ineffective assistance of counsel?

3. Does petitioner with four diagnosed mental disorders plea of guilty, constitue a guilty plea made, "knowingly, voluntarily and intelligently?

4. Does appellate attorney decision to present brief to court without consulting petitioner on the two issues presented amount to ineffective assistance of counsel? In addition, does the prsentation of issues that should have been made at trial by trial attorney by the appellate attorney signal attorney bias and prejudice for the petitioner?

5. Does presumption of correctness allowed by the courts for state documents allow for attorney prejudice and does this right violate the due process of law for the petitioner guaranteed by the 14th amendment?

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,
[X] 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[X] is unpublished.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 _____ to the petition and is

[ ] reported at _____; or,
[X] 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 F to the petition and is

[X] reported at #1 (Tex App - Dallas June 16 2014.; or, pet ref:d)
[ ] has been designated for publication but is not yet reported; or,
[X] 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 May 28 2019.

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

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

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

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

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

The date on which the highest state court decided my case was June 16. 2014. A copy of that decision appears at Appendix F_____.

[ ] 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

§2254 (d) (2) "that the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing.

United States Service Code Title 28 Judiciary and Judicial Procedure §2254 State Custody; remedies in Federal courts 9. (Deference to state court determination) In habeas proceedings for state prisoners, federal courts give deference to state court's findings of fact..., applicant shall have burden of rebutting presumption of correctness by clear and convincing evidence.

US Constitution Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

US Constitution Amendment 8

Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Us Constitution Amendment 14 Section 1 [Citizens of the United States]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside No State shall make or enforce any law which shall abridge the priviledges or immunites of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Paul Malone pleaded guilty to aggravated assault with a deadly weapon causing serious bodily injury and involving family violence. The jury assessed punishment at forty-five years imprisonment in TDCJ and a $10.000.00 dollar fine. Petitioner appealed on the grounds of ineffective assistance of counsel by trial and appellate attorney. The direct appeal was denied by the Texas Court of Criminal appeal due to the two grounds raised by appellate attorney were not raised at trial. Petitioner then appealed to the United States Court in the Northern District of Texas. He alleged that his trial attorney was ineffective for informing him that he could not pursue a defense of temporary insanity due to the diagnosis of four mental defects and that neither trial attorney nor appellate attorney investigated the mental diorders in order to prepare defense promised by the Sixth Amendment of the U.S. Constitution. He also alleged that trial attorney was not truthful in his affidavit to the appellate court and that this violated his 14th Amendment rights to due process as the presumption of correctness allowed by the courts, did not give him the same equal rights. The magistrate judge citing, AEDPA and Strickland v Washington, 466 US 668 (1984) claimed that it was doubly deferential and thus the claim for habeas corpus should be denied. The United States Court of Appeals for the Fifth Circuit stated that the petitioner failed to make a showing of denial of a constitutional right and affirmed the decision of the Northern District.

REASONS FOR GRANTING THE PETITION

In his denial of federal habeas writ, the magistrate judge states, "As set out above, the state habeas court obtained an affidavit from Jackson....,That court then developed a record and made credibility determinations, choosing to credit Jackson's sworn testimony....,
The trial court's determination that Jacson was credible-on which the CCA denied Malone's IAC claims- makes it even more difficult for Malone to obtain Section 2254 relief as to these claims." Without any evidentiary hearing, the trial and appellate courts of Texas gave credibility to trial attorney Ray Jackson's affidavit. Petitioner advised the appeal courts tht the trial attorney was not being truthful in his affidavit but there was no independent verification of the assertions of the trial attorney in his affidavit. The petitioner, incarcerated then tried to provide evidence of the attorney perjury. In his affidavit, the attorney claimed to have contacted family members in order to have them testify for petitioner at trial. The attorney, nor his investigator never asked for contact information for the family members and if asked could not provide any phone or any means to show how they contacted the family members. Petitioner asked his family members to provide letters disputing the claims of the attorney. In the response to the Reply of the Director of TDCJ, petitioner included these letters and sent them to the magistrate judge. Under Dowitt v. Johnson, 230 F.3d, 733 5th Cir 2000, it states, "Although family member affidavits had not been presented to state court, consideration of affidavits was not barred on federal habeas appeal due to failure to exhaust state remedies, where all crucial facts were before state couts at time they ruled on merits of state habeas petition" 28 USCA§2254(b). Here was direct evidence refuting a major claim of the trial attorney in his trial affidavit to the court and the judge states that deference did not

did not allow for the court to determine if there was any evidence of trial attorney perjury. The petitioner being incarcerated, has no means by which to prove attorney perjury. The office of the Public Defender of Texas ignored the requests of the petitioner for any and all material related to trial preparation by the trial attorney and the investigator. Clearly, the courts by siding with the determination of credibility by trial attorney are not considering the possibilty of perjury by trial attorneys in their decision making which petitioner will adress later in this petition. By utilizing the affidavit of trial attorney, the state court made decisions based on perjured testinomy. Dowitt, supra, "Section 2254 (d) (2) speaks to factual determinations made by the state courts. See 28 USC§2254 (e) (1) While we presume such determinations to be correct, the petitioner can rebut this presumption by clear and convincing evidence"... (741). The evidence before the magistrate judge should have allowed for a review of the claims of the trial attorney. Petitioner believes that by relying on the trial affidavit of the trial attorney, the state and federal courts made an unreasonble determination of the facts. Gardner v Johnson, 247 F.3d 551 (5th Cir. (2001), "Factual findings of the state court are presumed to be correct so as to be entitled to deference on federal habeas review, unless they were based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C.A§2254. The affidavit by trial lawyer was presented upon appeal and not during the trial. How is it possible for the petitioner to challenge the affidavit on appeal when the state is given a presumption of correctness? This allows an attorney who is well versed in the law, the opportunity to perjure himslef with immunity. The petitioner is cleary at a disadvantage because his testimony is not given the same credibility. The

14th amendment guarantees that no citizen shall be deprived of freedom without due process of law. If the court allows an attorney to submit an affidavit and based on his or her, "credibility", then they are basically providing the attorney with a "Jesus" type of characterization that defies the logic of human behavior in which one person can commit perjury or be untruthful because of their very profession. In this case, the court seems to be saying because you are an attorney we will believe you over the petitioner. No where in the US Constitution do the founding fathers advocate triumph of judicial servants over those accused of crime. By allowing for this type of sanctimonius distinction of truth, the courts do a great disservice to the very idea of justice. In his trial affidavit, Ray Jackson asserts, after he tells the court that the petitioner never insisted that his actions were based on insanity, "We discussed insanity in our preparations, and I told him that as far as proving temporary insanity, one difficulty if the problem of proof, since any examination by psychiatrists had to be after the fact, so the only evidence must be your conduct immediately before or after the crime. I then explained that based on his acts after the shooting, e.g, him saying to his wife in response to her saying they were done, shooting her then saying, "Now we're done," to Mr. Malone throwing away the bullets and hiding the weapon, that those acts and others would make temporary insanity a difficult defense." Despite the fact that petitioner never participated in any preparation, the attorney mentions items that were testified to during the trial and petitioner had no way of knowing that his ex-wife would tell that to the jury. The petitioner also never in any record, testified to throwing away bullets or hiding a weapon. The attorney also alleged that, "Mr. Malone also wanted me to bring his little daughters to court to have them dispute some of the allegations that were made

allegations that were made about him that had noting to do with the crime or what he was accused of, but had more to do with his parenting style. Despite the fact that my daughters were both 15 and 16 year of age respectively, the same age as my ex-wife's daughter who testified to incorrect characterizations of my behavior, the trial attorney never advised the court that in order to have me accept the slow plea he advised, he promised to bring my daughters, my son, my supervisor at work and the therapist who treated me for depression at the punishment phase of my trial. The numerous deceptions he testified to in his affidavit were not challened by the courts because of the presumption of correctness. Had the petitioner been able to hold an evidentiary hearing, the numerous untruthful statements of the trial attorney could have been investigated. While the courts will call these statements cursory, the petitioner believes that the fact that most of the state habeas findings of facts, relied on the perjured allegations of his trial attorney would have made any decision by state courts unreasonable in light of that fact.

In Valdez v Cockrell, 274 F.3d. 941 (5th Cir 2001), the court ruled,"On an application for a writ of habeas corpus, the district court has the discretion to receive evidence via affidavits; introduction of affidavits into evidence is subject to the right of the opponent to cross-examine the affidavits by written interrogatories. 28 U.S.C.A.§2246" The petitioner was not given the opportunity to challenge the affidavit at any state of his proceedings. Valdez, supra, "we are well aware that we cannot grant habeas relief to a petitioner unless he can show tht he suffered, "actual prejudice" from the trial error at issue. Actual prejudice results when " the error had substantial and injurious effect or influence in determining the jury's verdict." The only defense available to the petitioner was temporary insanity and the trial lawyer did little or any investigation

of the four mental defects that he knew of prior to trial because he was informed by the petitioner of the diagnosis of the jail psychiatric caregiver. The question is thus whether the absence of any investigation into the four mental defects of the petitioner amount to ineffective assistance of counsel? The acceptance of the affidavit by state appellate court and trial court without vetting, have violated the petitoner's right to due process. Under Strickland v Washington, 466 US 668, 104 S.Ct. 2052 80 L.Ed. 6784, "A criminal defendant making a claim of ineffective assistance of counsel must identify the acts for omission of counsel that are alleged not to have been the result of professional judgment, the court must then determine whether, in light of all circumstances, the identified acts or omissions were outside the wide range of professional, competent assistance, keeping in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case, and recognizing that counsel is strongly prsumed to have rendered adequate assistance and made all sinificant decisions in the exercise of reasonable professional judgement. The petitioner is not an attorney and not having had one iota of training as such, he does not believe that any court would assert that there was any reason available that would be strategic for trial attorney to abandon any investigation of a mentally impaired defendant when the trial attorney had proof that his client was suffering from four mental disorders, one being impulsive rage disorder that he was informed caused his client to suffer blackouts and commit acts while unaware of right or wrong but instead without any professional testimony or knowledge, advised the jury that his client was sufferring from a "road rage" condition. Besides the perjured testimony in his affidavit, the trial attorney offers no evidence of a strategice defense for his client. Despite the findings and facts of the

state trial court that "All of these experts actually participated in treating Applicant's mental health issues.", the reality was that a psychiatric assistant with nine months of schooling; a therapist with a degree in sociology met with petitioner for two one hour counseling sessions; a jail house psychiatric liaison with a degree in sociology only referred petitioner to the jail psychiatric staff; the jury never heard from a person with a psychiatric degree except for the petitioner. It was fundamentally unfair to petitioner for a jury to only be given a one-sided opinion of his mental disorders without any expert testimony to verify the actual state of the petitioner's mental functioning during the trial and for the court to say that because of deference, the trial attorney was effective and thus his conduct cannot be looked at for error. Strickland, supra continues, "In adjudicating a claim of actual ineffectiveness of criminal defense counsel, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged and in whether despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results" (668). The fact that the attorney was able to provide an unchallenged affidavit of his version of events, alone with a mentally ill client who was unable to properly defend himself in addition to an appellate attorney who submitted a brief to the appeal court before allowing her client to review the issues signal a broken down system that has no affinity for indigent, mentally impaired clients. The public is at risk because well educated attorneys who have a bias toward the crime of their clients and who are receiving litte compensation for defending them are able to manipulate uninformed clients and thus pervert the judicial system. Who is able to verify the claims of the attorneys who enjoy unfettered respect from an over burdened judicial system that wants to eliminate cases from their

dockets? "The constitutional norms by which effectiveness of criminal representation is measured extend equally to the guilt and sentencing phases of capital trials. Essential to the rendition of constitutionally adequate assistance in either phase is a reasonably substantial, independent investigation into the circumstances and the law from which potential defenses may be derived." "The obligation to investigate, in the context of ..., requires defense counsel to undertake a reasonably thorough pretrial inquiry into the defenses which might be offered in mitigation of punishment, and to ground the selection among those potential defenses on an informed professional evaluation of their relative prospects for success." Baldwin v Maggio, 704 F. 2d. 1325, 1332-33 (5th Cir 1983). No where in the affidavit of trial attorney Ray Jackson is there any evidenc eof a reasonably effective investigation into the mental defects of the petitioner. The professional norms requirement cannot be met by unsubstantiated words in an affidavit that tell of psychic capabilites of an attorney who is able to inform his clients of items that have yet to be identified until the actual trial. His ability to explain away the needed testimony of two teenage children who could have refuted the claims of an "controlling, abusive, violent parent who stalked his ex-wife and only allowed his children one bath a week" from an unchallenged prosecutor; rival only the appellate attorney whose bias into her client was reflected by the frivolous issues she presented unknowingly to the appeal court. "To insure that guilty pleas are entered only as the result of an informed and conscious choice, accused has the right to the effective assistance of counsel in deciding upon and entering such a plea, and that instrumental right cannot be satisfied by a facade, but requires actual and competent advice." Diaz v Martin, 718 F.2d, 1372 (1983). Does a mentally impaired petitioner have the capability to plead guilty? In Bosley v United States, 523 US 614, 140 L.Ed. 828 118 S.Ct. 1604, it states,"Several years before we decided

Timmreck, the court had held that it is reversible trial error for a trial judge to accept a guilty plea without following the procedures dictated by Rule 11 of the Federal Rules of Criminal Procedure McCarthy v United States, 394 U.S. 459, 22 L.Ed. 2d 418, 89 S.Ct. 1166 (1969)".

Rule 11(2) Ensuring that a plea is voluntary
Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises FRCR p 58 2018.

No where in the trial record does the trial judge ask petitioner of any promises or threats from the trial attorney. Petitioner advised the court in his state habeas petition that trial attorney coerced him into pleading guilty by telling him that temporary insanity was not a legal defense in the state and promising him to have his children, work supervisor, therapist and family members testify on his behalf. All of this was taking place after the trial attorney was notified that his client was suffering from bi-polar disorder, post-traumatic-stress-disorder, manic depression and impulsive rage disorder. The attorney also knew that his client had been prescribed mental health drugs while in jail to help deal with his mental issues and was throughout the trial. "When defendant pleads guilty on basis of promise by his defense attorney or prosecutor, whether or not such promise is fulfillable, breach of that promise taints involuntariness of his plea." Montoya v Johnson, 226 F.3d. 399, 405 5th Cir (2000). The very notion that a defendant, taking prescribed mental health medicine, would not seek a mental health defense flies in the face of common sense. This is not the action of a lawyer who has exhausted every sensible inquiry into his client's possible defense. By denying petitioner the defense of temporary insanity, the trial lawyer inflicted, "actual prejudice" from the trial error at issue. "Actual prejudice results when "the error had substantial and injurious effect or influence

in determining the jury's verdict." Gardner, supra, (562). The prosecutor advised the jury that the petitioner was simply making up his ailments because he had a degree in psychology and the trial lawyer made no attempt to refute the allegations in the record. The lawyer told the petitioner that when he testified after being cross-examined by the state, he would bring the petitioner back to refute the state's cross, but after the state finished, he told the judge he had no further questions. All of this happened while the petitioner was suffering from four mental defects and under the influence of psychiatric medicines. The petitioner alleges that he did not receive a full and fair hearing under the law as no psychiatric expert was allowed to testify to the jury about his mental defects and thus the fact that the jury made have considered the mitigating circumstances for his crime when they decided his sentencing was nullified. This court has held that in Valdez v Cockrell, 274 F.3d. 941, 5th Cir 2001, "§2254(d) explicityly provided that the denial of a full and fair hearing defeated the presumption of correctness". and in Miller v Champion, 161 F.3d.1249 (10th Cir 1998), "The Tenth Cricuit recognized..., thus presmption of correctness does not apply... if the habeas petitioner did not receive a full, fair and adequate hearing in the state court proceeding on the matter sought in the habeas petition." The state court refused to hold an evidentiary hearing on the issue of the attorney trial affidavit and Miller, supra contines, "The Court in Miller clearly held, post-AEDPA, that the failure of the state court to conduct a full and fair evidentiary hearing precluded AEDPA's deference to the state court's mixed law and facts conclusions." (941). Cockrell, supra,"A more solid interpretation of the AEDPA would be one that observes ordinary constitutional due process standards." The petitioner is asking that the court exercise it's tremendous judicial power and prevent the state

from denying petitioner his rights under the US Constitution and allow a fair examination of his mental health that he was denied at trial. The family affidavits that refute the trial lawyer allegations in his trial affidavit are clear and convincing evidence of the perjury committed by the trial lawyer. In Lambert v Blackwell, 387 F.3d. 210, 235(CA3 2004) , it states, "§2254 (d) (2)'s reasonable determination turns on a consideration of the totality of the 'evidence' presented in the state-court proceeding, while §2254 (e) (1) contemplates a challenge to the state court's individual factual determinations, including a challenge based wholly or in part on evidence outside the state trial record"); Trusell v Bowersox 447 F.3d. 588, 561 (CA8) (federal habeas relief is available only "if the state court made 'an unreasonable determination of the facts in light of the evidence presented in the state court proceeding,' 28 U.S.C. §2254 (d) (2), which requires clear and convincing evidence that the state court's presumptively correct factual finding lacks evidentiary support"). cert denied 549 U.S. 1034, 127 S.Ct. 583, 166 L.Ed. 2d. 434(2006) Ben-Yisrayl v Buss, 540 F.3d. 542, 549 (CA72008) (§2254 (d) (2) can be satisfied by showing under §2254 (e) (1) that a state-court decision "rests upon a determination of fact that lies against the clear weight of evidence" because such a decision is by definition, a decision so inadequately supported by the record as to be arbitrary and therefore objectively unreasonable.") The finding of the state as it relates to the mental health of the petitioner was not supported by the record and thus the petitioner had his family send in affidavits to prove the trial lawyer committed perjury which prejudiced the defense of the charges. Petitioner believes his mental defects prevented him from knowingly understanding the implications of his guilty plea and had his trial lawyer not provided him with incorrect information concerning the law in Texas, he would have asked to go to

trial. In Bouchillon v Collins, 907 F.2d. 589 (5th Cir 1990), it states, "Defense attorney's failure to investigate petitoner's competency to stand trial or viability of insanity defense was deficient performance for purposes of ineffective assistance of counsel; petitioner had no defense available to him other than insanity..,attorney..,did not ask for psychiatric evaluation and trial court and defense attorney had only limited ocntact with petitioner and their observations that he "appeared rational" were therefore less meaningful" U.S.C.A. Const Amend 6. As in that case, the petitioner had four identified mental disorders and yet the trial attorney decided not to pursue the only defense for the crime. Bouchillon, supra, continues, "As previously noted, the state court in reviewing Bouchillon's petition, relied almost exclusively on the evidence of Bouchillon's demeanor at the..,proceeding and the testimony of his trial counsel to hold that he was competent." The magistrate judge makes a statement that petitioner did not tell the court that he did not understand the charges against him but he does not mention that the petitioner was suffering form four mental disorders and under several psychiatric medicines during the trial. In Bouchillion, supra, it also states, "in this case the state held no evidentiary proceedings - either at the time of the plea or after the fact. Its fact finding was limited to observing Bouchillon's demeanor, and as, the Supreme Court indicated in Pate, demeanor is not dipositive. Pate supra, 383 U.S. at 386, 86 S. Ct. at 842 "The existence of even a severe psychiatric defect is not always apparent to laymen Bruce v Estelle 536 F.2d. 1051, 1059 (5th Cir 1976) at 1059 " One need not be catatonic, raving or frothing, to be legally incompetent." Lokos v Capps 625 F.2d 1285, 1261-1264 (5th Cir 1980) The magistrate judge implies that petitioner had to inform the court of his mental impairment but the petitioner alleges it is because of his mental defects that he was unable to competently assist in his defense and that the judgema

trial attorney had a duty under the 6th Amendment to investigate and inform the court of the only defense for his client. There was clear and convincing evidence of four mental disorders and the ttial lawyer admits to having conducted no investigation because of his assertion that Malone had to "prove" his disorder. As the court stated in Strickland, supra, "Counsel has a duty to make reasonable investigations..," ID at 691, 104 S. Ct. at 2066. "A particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference for to counsel's judgements." Trial attorney made no phone calls, did not consult any of the witnesses for defense concerning petitioner's mental problems, did not request any records concerning mental health because he said the question was, "proof". The court in Bouchillion, stated when this level of investigations falters, it, "clearly [fell] below the level of customary skill and knowledge required of attorneys when only one defense is available." Profitt at 1249 (Profitt v Waldren 831 F. 2d. 1245 (5th Cir 1982). The state court made an unreasonable decision to accept a perjured affidavit and thus denied petitioner due process under the 14th amendment. In Summer v Mota, 101 S. Ct. 746, 769 (1981), ".. Congress provided in §2254 (d) that a habeas court could not dispense with "the presumption of correctness" embodied therein unless it concluded that the factual determinations were not supported by the record,..". In this case, the factual determination that psychiatric experts testified for the petitioner was incorrect and the deference allowed led to an unreasonable application of Strickland.

Petitioner alleges that the appellate attorney was ineffective for presenting two issues to the appeal court that she had to know would be denied as untimely. Petitioner believes that the attorney had bias for her client due to the nature of his crime. By denying her client

the opportunity to review the issues before submitting them, she denied him due process. In this case she failed to raise issues that would have entitled Maloned to a reversal of his conviction, mainly the lack of investigation of four mental defects and the competency of her client at trial. She too offered no explanation for not investigating the mental health of her client nor talked to any witnessess or requested records on her client's mental health. The court in Lombard v Lynaugh, 868 F.2d 1475 (5th Cir 1989), "(if counsel entirely fails to subject the prosecutor's case to meaningfull adversaial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable") Here, Cahoon did nothing to attempt to aid Lombard's appeal, beyond the initial perfectif of the appeal itself. We are hence comfortable in not requiring Lombard of showing, at the least, that his conviction would have been reversed had he had the effective assistance of appellate counsel. (1481). In the judgement of the magistrate judge, the fact that the appellate attorney presented two frivolous issues after she replied to the numerous letters sent by petitioner, inquiring as to the structure of the issues on appeal, she was entitled to deference from AEDPA and Strickland. What happens when an attorney, who is well versed in the law decides to just do what is necessary to represent her client and not what is required under the Constitution? The public at large in Texas cannot be assured of receiving effective assistance of counsel because the court has ruled that as long as the attorny provides a brief, they have fulfilled their duties to the client. There were nonfrivolous issues that April Smith could have researched and she chose not to pursue those. In Lombard, supra, the court states, "although there were clearly nonfrivolous issues which could have been urged in Lombard's appeal and we are unable to determine

that Lombard's conviction would not have been reversed had he had effective assistance of counsel, we are unable to determine the converse. However, we conclude that these considerations do not suffice to require Lombard to show Strickland type prejudice, Lombard, in a functional sense was almost no appeal representation whatever, and there were nonfrivolous appeal issues which we cannot say with full confidence would not have resulted in reversal had they been raised and properly argued by competent appellate counsel. Lombard therefore need not, as he would have to if Strickland applied, discharge the burden of convincing us that, at least, reverslas was reasonably probable ahd he been properly represented on appeal." Jones v Barnes 463 US 745 103 S.Ct. 338 L.Ed.2d 987 (1983). The magistrate judge's conclusion that the appellate attorney did provide effective assistance of counsel flies in the face of a reasonable deterrmination. Not only did Smith provide the petitioner with a brief after submitting it to the appeal court, she also failed to verify the contents of the court transcripts with the petitioner before certifying they were correct with the appeal court. Jones, supra contines, "Experienced advocates have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues. Selecting the most promising issues for review has assumed a greater importanc ein an era when the time limit for oral argument is strictly limited..," 3310. "Anders recognized that the advocate's role, "required that he support his client's appeal to the best of his ability." 386 US at 744 87 S.Ct. at 1400.. There is no doubt as to the perfunctory performace of April Smith and the state of Texas in basically admitting that they only have to put words on paper to meet the requirement of the Constitution's Sixth Amendment. Once again, there is little or no investigation of the petitioners claims as to his mer

the four diagnosed mental disorders. Justice Brenner with whom Justice Marshall in their dissent of Jones, supra on pg 3317, "he must furnish his client a brief covering all arguable grounds for appeal so that the client may "raise any point that he chooses." 386 US at 744 87 S.Ct. at 1400. Clearly Smith does not address this in her affidavit nor does the magistrate judge in his conclusions. Basically, the court is saying that as long as the court sees a brief with any issues, there is deference allowed without regard of ineffective assistance claims. The petitioner was stuck with a brief that he had never seen and could not dispute the frivolous issues once submitted to the appeal court. The petitioner believes that had either attorney investigated the mental disorders diagnosed by the jail psychiatric assistant, the jury would have had clear evidence that may have mitigated the extreme sentence imposed on the petitioner who had little or no criminal history.

In summary, trial attorney's affidavit contained perjured testimony and violated the petitioner's 14th amendment rights when it was given a presumption of correction without any evidentiary hearing to vet the truthfulness of the attorney statements. An attorney who is given carte blanche protection from proving the veracity of their documents have violated the due process clause of the Constitution. The guilty plea of the petitioner suffering from four mental health disorders should not be recognized as voluntary as the petitioner was given incorrect information by his trial attorney and his competency was never investigated at any stage of the proceeding. The appellate attorney presented two friviolous issues without presenting the brief to petitioner before sending it to the appellate court. The fact that the issues were frivolous should constitute ineffective assistance of counsel and

court should recognize the violation of the 6th Amendment and allow for an evidentiary hearing to examine the mental status of the petitioner at trial. In Lokos v Capps, 625 F.2d, 1258 5th Cir 1980, it states, "State procedures must be adequate to insure the right to be tried while competent." At no time did the state or trial attorney properly rule on the competency of the petitioner during trial. There was no "proper medical opinion" Pate v Robison, 383 US 375 86 S.Ct. 836k 15 L.Ed. 2d 815 (1966), proffered by trial attorney. "If it is decided in the collateral attack that the orginal trial court committed a Pate violation, the question then becomes whether a hearing can now be adequately held to determine retrospectively, the petitioner's competency as of the time of his trial." "If the state does not convince the court that the tools of ratioal decision are now available, the writ should be granted. The federal court made an unreasonable decision, and the evidence for writ is present.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Paul Mabre

Date: August 25, 2019