

No. \_\_\_\_\_

**19-6951**

IN THE  
SUPREME COURT OF THE UNITED STATES

**ORIGINAL**

Ruben Ramirez — PETITIONER  
(Your Name)

FILED  
DEC 03 2019

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

vs.  
Lorie Davis — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Fifth Circuit

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Ruben Ramirez

(Your Name)

59 Darrington Road

(Address)

Rosharon, Texas 77583

(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

Whether the lower federal courts erred in determining that newly available evidence, in the form of affidavit of co-defendant's attorney, John Nathan Strak, did not meet the requirements of 28 U.S.C. §2244(d)(1)(D), and, therefore, Ramirez's habeas claim that the guilty plea entered as to Count Two, paragraph B. of the indictment, was the result of coercion on the part of trial counsel, was time-barred.

Whether affidavit discovered in the course of initial collateral review containing new information regarding Ramirez's claim that the guilty plea entered as to Count Two, paragraph B. of the indictment, was the result of coercion, constitutes newly discovered evidence under the guidelines of 28 U.S.C. §2244(d)(1)(D).

## LIST OF PARTIES

- 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:

## TABLE OF AUTHORITIES CITED

### CASES

	PAGE NUMBER
Carter v. Bigelow, 787 F.3d 1269 (10th Cir. 2018) . . . . .	6
Cook v. N.Y. State State Div. of Parole, 321 F.3d 35274 (2nd Cir. 2003) . . . . .	6
Evans v. Sec'y, Pa. Dep't of Corr., 645 F.3d 650 (3rd Cir. 2011) . . . . .	6
Starns v. Andrews, 524 F.3d 612 (5th Cir. 2008) . . . . .	7

### STATUTES AND RULES

28 U.S.C. § 2244 (d)(1) . . . . .	5,6,7
28 U.S.C. § 2244 (d)(1)(D) . . . . .	5,6,7
28 U.S.C. § 2254 . . . . .	5
Article 11.07 Texas Code of Criminal Procedure	

### OTHER

## TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	3
STATEMENT OF THE CASE .....	4
REASONS FOR GRANTING THE WRIT .....	5
CONCLUSION.....	8

## INDEX TO APPENDICES

APPENDIX A: United States Court of Appeals, Fifth Circuit  
Judgment and Mandate

APPENDIX B: United States District Court, Western District of  
Texas, Dismissal Order

APPENDIX C

APPENDIX D

APPENDIX E

APPENDIX F

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**

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

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

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

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

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

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

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

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

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

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

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

United States Constitution, Amendment XIV

U.S.C. § 2244

U.S.C. § 2254

## STATEMENT OF THE CASE

Petitioner was convicted of murder and serious bodily injury to a child and was sentenced to life imprisonment and ninety-nine years imprisonment in February 2009. His convictions were affirmed on direct appeal, and his petition for discretionary review (PDR) was refused on February 9, 2011. In May 2016, Petitioner filed his first state habeas corpus application challenging his convictions, which was denied by the Texas Court of Criminal Appeals without written order on October 12, 2016. After the October 12th date, Petitioner received copies of affidavits from attorneys Robert Cain (trial counsel) and John N. Stark (co-defendant's trial counsel), that contained new evidence not available to the petitioner that substantiated his claim that his guilty plea to Count Two, paragraph B of the indictment was coerced by trial counsel, Robert Cain.

Based on the newly discovered evidence, Petitioner filed a second state habeas corpus application on July 26, 2017, which was dismissed by the Texas Court of Criminal Appeals as a subsequent writ on August 9, 2017.

Petitioner then raised his claim, based on newly discovered evidence, in a federal application for writ of habeas corpus on August 8, 2018. Petitioner's federal petition for habeas corpus was dismissed by the United States District Court, Western District of Texas as time-barred on October 4, 2018. Certificate for Appealability was denied by the Fifth Circuit on September 5, 2019.

## REASONS FOR GRANTING THE PETITION

Under 28 U.S.C. § 2244(d)(1), § 2054 petitions must be filed within one year of (1) the final judgment on direct review; (2) the expiration of the time for seeking such review; (3) the removal of any state-imposed impediment that unconstitutionally prevented the filing of such a petition; (4) the Supreme Court's announcement of a new, retroactively applicable constitutional right; or (5) the date on which the facts supporting the claim could have been discovered through due diligence. Standing on the legal precedent before him, Ramirez maintains that pursuant to 28 U.S.C. § 2244 (d)(1)(D), the facts supporting his claim that the guilty plea entered as to Count Two, paragraph B of the indictment, was the result of coercion on the part of trial counsel, was discovered during initial collateral review through the exercise of due diligence, thus, his claim is not time barred, as determined by the Fifth Circuit Court of Appeals.

Petitioner filed his original state habeas corpus (11.07) application on May 19, 2016, and was denied relief on October 12, 2019. However, after this October 12th date, Petitioner received from the district clerk copies of affidavits filed by counsels Robert A. Cain (trial counsel) and John N. Stark (co-defendant's trial counsel). Contained in John Stark's affidavit was new evidence previously unavailable to the Petitioner that proved his claim that that his guilty plea to Count Two, paragraph B of the indictment was the result of coercion.

Petitioner had no intent to file a federal writ, understanding that his AEDPA time clock had run out, until the discovery of previously unavailable evidence contained in Stark's affidavit. Once discovered, Petitioner made the decision to file a subsequent state petition for habeas corpus relief, followed by a federal writ, with the understanding that pursuant to 28 U.S.C. §2244(d)(1)(D), said newly discovered evidence restarted his 1 year AEDPA time clock in regards to his claim.

The Fifth Circuit Court of Appeals determined that Starks's affidavit did not contain newly discovered evidence in accord with 28 U.S.C. § 2244 and time-barred Petitioner from federal review. However, the Fifth Circuit's decision is in conflict with decisions of other United States Courts of Appeals, who have determined that similar evidence started the 1 year AEDPA time clock for federal habeas review.

In Cook v. N.Y. State Div. of Parole, 321 F.3d 274 (2nd Cir. 2003), the court determined that year ran from date petitioner was notified that decision to revoke parole became final. Likewise, in Evans v. Sec'y, Pa. Dep't of Corr., the 3rd Circuit court found the year ran from date of amendment of Commitment Sheet because claim regarding amendment could not be brought previously. See Evans at 645 F.3d 650, 653 n. 10 (3rd. Cir. 2011). While distinctively different, the principle is the same in Evans and the instant case. Likewise, in Caterov, Bigelow, 787 F.3d 1269 (10th Cir. 2015), the court found that the year began on the date petitioner received Brady information/evidence that formed the basis of his claim.

Possibly the most interesting finding was by the Fifth Circuit itself, who determined that the year began on the date counsel received transcripts and began reading them because transcripts provided evidence to substantiate petitioner's claim. See Starns v. Andrews, 524 F.3d 612 (5th Cir. 2008).

In line with the above-cited cases, the evidence to substantiate petitioner's claim that his plea of guilty to Count Two, paragraph B, of the indictment was coerced, was found in the affidavit of Stark, namely, that petitioner and his co-defendant entered pleas of guilty based on the advice of counsel. Consequently, the 1 year AEDPA time limitation ran from that date, and the lower court's decisions conflicts with the decision of other United States courts of appeals on an important matter.

Additionally, the Fifth Circuit Court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court; namely, whether information contained in an affidavit filed during initial collateral review can be construed as newly discovered evidence under the guide lines imposed by 28 U.S.C. § 2244 (d)(1)(D). To date, this issue has not been directly addressed by this Court to the extent of petitioner's knowledge.

The remedy sought by petitioner is that his claim that his plea of guilty to Count Two, paragraph B, of the indictment was coerced be deemed not time barred and reviewed by the lower courts based on their merit.

Without intervention in this matter, there is no Due Process protection, as required by the 14th Amendment, which is why the Untied States Supreme Court should grant certiorari.

## **CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Shulan Remigio

Date: 11-24-2019