19-6987

No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

DARRELL WAYNE BELL — PETITIONER
(Your Name)

vs.

LORIE DAVIS, TDCJ DIRECTOR — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

5th CIRCUIT COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

DARRELL WAYNE BELL
(Your Name)

2661 F.M. 2054
(Address)

TENNESSEE COLONY, TEXAS 75844
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

QUESTION ONE:

Did the 5th Circuit Court of Appeals exceed the limited scope of the Certificate of Appealability (COA) standard using a merits analysis to denying Petitioner's C.O.A.?

QUESTION TWO:

Is this Court's precedent in Shulp v. Delo diminished by the conflict of the Circuit Court's in determining what constitute's "Newly Discovered Evidence", to warrant habeas relief in actual innocence cases under Shulp?

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:

TRIAL JUDGE – Honorable Judge Christi Kennedy
114th District Court
100 N. Broadway
Tyler, Texas 75702

DISTRICT ATTORNEY – Mr. Jacob Putnam
100 N. Broadway
Tyler, Texas 75702

ATTORNEY GENERAL – Mr. Ken Paxton
P.O. Box 12548
Austin, Texas 78711-2548

TRIAL COUNSEL – Mr. Mathew B. Ratekin
100 N. Broadway
Tyler, Texas 75702

APPELLATE COUNSEL – Mr. Austin Reeve Jackson
305 S. Broadway, Suite 700
Tyler, Texas 75702

RELATED CASES

- State v. Darrell W. Bell, No. 114-1078-14, 114th District Court of Tyler, Texas Judgement entered Decemeber 29, 2014.
- Darrell W. Bell v. State, No. 12-15-00022-CR, 12th Court of Appeal of Texas. Judgement entered Sept. 5, 2015.
- Ex Parte Bell, No. WR-51, 832-02, Tx. Court of Criminal Appeals, Judgement entered Dec. 7, 2016.
- Darrell W. Bell v. Lorie Davis, No 6:17-CV-341, U.S. District Court for the Eastern District of Texas. Judgement entered June 22, 2018.
- Darrell W. Bell v. Lorie Davis, No.18-40630, U.S. Court of Appeals for the Fifth Circuit. Judgement entered March 25, 2019.

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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

[✓] 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,
[✓] 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,
[✓] is unpublished.

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

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

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[ ] is unpublished.

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

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

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was March 25, 2019.

[ ] 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: June 26, 2019, 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 9-18-2019 (date) on 11-23-2019 (date) in Application No. 19 A 316.

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

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

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

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

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

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

6th AMENDMENT: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district shall 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.

14th AMENDMENT SECTION 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was indicted for the offense of continuous sexual assault of a child under 14, Texas Penal Code 21.02. Under this statute, the essential element, the gravamen of the 21.02 statute, is the "continuous" course of sexual abuse. Proof of two or more sexual acts committed within a 30 day or more period will constitute a conviction under this statute.

During trial, the complainant (L.K.), described three instances of sexual abuse. The first, L.K. described two (2) instances of sexual abuse happening on the same day but could not provide what day or even the time of year. See 7 R.R. p. 33. L.K. then testified of a sexual assault instance occuring on cable day which was later testified to as September 20, 2013. See 7 R.R. p. 34-44. The last instance was allegedly in Novemember of 2013.Id at 44. Petitioner was convicted upon the above instances of sexual abuse and received a life sentence. See State's Clerk's Records p. 93-94.

During his post-conviction collateral attack process, Petitioner, after over a year since his conviction, obtained his attorney-client file from his trial attorney Mathew Ratekin which contained material documents that could have been used to support his defense. The first documents was school records showing L.K.'s attendance at her school on "cable day" (September 20, 2013) at the same "time of day" she alleged to being at Petitioner's house "alone" when the sexual assault allegedlly occurred. See ROA.41-43 .

The second document was from a cable techician, a chonclogical report of the cable services done at Petitioner's house, specifically, on September 20, 2013, who was present with Petitioner alone at the time of L.K.'s alleged alleged assault. _ R.R. p. _____; ROA.45-46 .

Upon raising the above issues in his State habeas corpus, as "newly discovered evidence" which was secreted by Ratekin which if presented to the jury, would have negated the State's evidence of two or more acts of sexual abuse required for a 21.02 conviction and would have resulted in an acquittal for the 21.02 charge.

The State Court relied on Ratekin's affidavit to deny State habeas relief which indicated that: " He believed that "neither of those records indicate any times", to when the defendant sexually assualted the victim, and the records would not have assisted the defendant so it was a tactical decision to not introduce the records". COA p. 6 in 12-17; ROA p.1239-40.

Petitioner furthered his habeas contentions arguing in the Federal Court that the State's decision denying his "new Evidence claim was an unreasonable determination of the facts presented in the State Court. 28 U.S.C. §§2244(d)(2) Petitioner's Federal Memorandum pages 6-10 ROA. 19 . The District Court adopted the Magistrate's acceptance of the State's position on Ratekin's affidavit, rejecting Petitioner's "New Evidence" argument and deeming his Federal petition as untimely. Record on appeal (ROA)129-130.

On his Certificate of Appealability (COA), Petitioner argued that his Federal habeas petition was timely Under 28 U.S.C. §§2244 (d)(1)(D). See COA p. 11. He also argued, under Schulp v. Delo, 513 U.S. 298(1995), that due to the ineffective assistance of his trial counsel, in failing to present the school records and cable tech information that he suffered a manifest injust conviction of a crime he didn't commit and the State could not prove.Id at Appendix E.

The 5th Circuit Court of Appeals, in denying Petitioner's COA, held, (1) that the evidence Petitioner presented was not newly discovered evidence because his trial counsel was aware of the documents before trial, thus

§§2244 (d)(1)(A) applied to his claim and was time barred and, (2) evidence was not new under the Schulp actual innocence standard if it was always within the reach of Petitioner's personal knowledge or reasonable investigation. See 5th Circuit opinion at 2-4; Appendix A.

REASONS FOR GRANTING THE PETITION

The 5th Circuit Court has entered a decision in conflict with the decision of other Court of Appeals on the same important matter and has decided an important federal question in a way that conflicts with relevant decisions of this Court. Supreme Court Rule 10(b) and (c).

QUESTION ONE (RESTATED):

Did the 5th Circuit Court of Appeals exceed the limited scope of the Certificate of Appealability (COA) standard using a merits analysis to denying Petitioner's C.O.A.?

On Petitioner's question for review in the 5th Circuit, "whether the District Court erred in concluding that claim based on Newly Discovered Evidence was time barred," Petitioner sought to show that the factual predicate date in which he discovered that his attorney had secreted the exculpatory documents was governed by 28 U.S.C. §§2244(d)(1)(D) and reasonable jurist would find the District Court's decision wrong or debatable. See Appendix E (Certificate of Appealability (COA)).

Instead of the 5th Circuit making a threshold inquiry into the under lying merits of the above claim to determine if Petitioner made a substantial showing, instaed employed a merits analysis. See Appendix A (5th Circuit of Appeals order at 2-3). The 5th Circuit's analysis on what they believe constitutes "newly discoverd evidence", then denying a COA on the merits of their own case, citing Stains v. Andrews, 524 F.3d. 612, 620-21(CA5 2008) (holding that a criminal defendant was considered to have learned of the factual predicate for his habeas claims when his attorney did), does not sound like they considered any other jurist but themselves in determining whether Petitioner made a substantial showing to warrant issuance of a COA.

According to 28 U.S.C. (c)(2), and this Courts precedent in Slack v. McDaniel, 529 U.S. 473, 484(2000), to obtain a COA Petitioner must make a substantial showing of the denial of a constitutional right.Id. When a district court denies Federal habeas relief on procedural grounds, a COA should issue when Petitioner establishes, at least, that jurist of reason would find it debatable whether the petition states a valid claim of a denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling, which Petitioner has shown in his COA. See Appendix E pages 4-22. Had the 5th Circuit Court applied these principles to Petitioner's application, a COA should have issued.

The 5th Circuit has created conflict between jurist of reason in the granting of a COA; e.g. Resondez v. Knight, 653 F.3d. 445, 446-47(CA7 2011), Fleming v. Evans, 481 f.3d. 1249, 1259(CA10 2007); Pabon v. Mahoroy, 654 F.3d. 385, 398 (CA3 2011), Reyes v. Keane, 90 F.3d. 676, 680(CA2 1996). This Court has also, in the past, needed to redirect the 5th Circuits attention on the issue of properly employing the COA standard. See Tennard v. Dretke, 542 U.S. 274; 159 L.Ed. 2d. 384, 124 S. Ct. 2562(2004); Buck v. Davis, 580 U.S. , 137 S. Ct. 197 L.Ed. 1(2017)

In Tennard v. Dretke Supra, this Court held that the 5th Circuits "uniquely serve permanent handicap" and nexus tests were incorrect and Tennard was entitled to a COA because reasonable jurist would find debatable or wrong the District Court's disposition of Tennard's low IQ. More recently, in Buck v. Davis Supra, this Court had to reinterate, Cheif Justice Roberts writing for the Court, that the COA "inquiry" is not coextensive with a merits analysis.Id. Cheif Roberts held that "the question for the 5th Circuit was not whether Buck

had shown extrodinary circumstances, but ask only if the District Court's decision was debatable".Id.

In the present case, the 5th Circuit determined that the evidence Petitioner presented was not new, instead of determining whether reasonable jurist could find the District Court's decision that the evidence was not new debatable, which in this case, they could. On the above merits, this Court's supervisory powers are requested to prevent a further departure, by the 5th Circuit, from dearly established federal law concerning the standard of issuance of Certificate of Appealability, Supreme Court Rule 10 ( ).

QUESTION TWO (RESTATED):

Is this Court's precedent in Shulp v. Delo diminished by the conflict of the Circuit Court's in determining what constitute's "Newly Discovered Evidence", to warrant habeas relief in actual innocence cases under Shulp?

The crux of the previrous question was that of newly discovered evidence. The current question deals with newly discovered evidence as well but towards how it is defined and how it is applied in actual innocence cases. Therefore, the fundamental question to be considered is whether Petitioner's aforementioned documents can be considered newly discovered and used for consideration under Shulp v. Delo, and if so, should Petitioner have been affored issuance of a COA on the issue?

Black's Law Dictionary defines newly discovered evidence as "evidence existing at the time of a motion or trial but then unknown to a party who, upon later discoverying it may assert it as grounds for reconsideration or a new trial".

Pre Schulp application of what defined "newly discovered evidence", this Court held in Johnson v. Mississippi,that new evidence is "evidence that creates doubt about the validity of the sentence". See Johnson v. Mississippi, 486 U.S. 578, 585, 108 S. Ct. 1981; 120 L.Ed. 2d. 575(1988).

Not to quote, verbatim, historical colloquy of American jurisprudence on substantive or procedural litigation on the ends and outs of actual innocence claims and newly discovered evidence, but this Court's precedent's show us that their are two types of actual innocence claims that can be raised i.e. Herrera v. Collins and Schulp v. Delo.

A Herrera claim, is a substantive claim in which a Petitioner argues his innocence based solely upon newly discovered evidence, "evidence that was neither introduced at trial nor available to the defense to introduced at trial. See Herrera v. Collins 506 U.S. 390, 400, 113 S. Ct. 853, 122 L.Ed. 2d. 203 (1993).

The Schulp v. Delo claim is procedural, rather than substantive, which is accompanied by a claim of constitutional error. The constitutional claims are not based on his innocence, but rather on his contentions that the ineffectiveness of his counsel...denied him the full paniply of protection afforded to him by the Constitution. The Schulp claim depends critically on the validity of his Strickland claim. See Schulp v. Delo 513 U.S. 298, 316, 115 S. Ct. 851, 130 L.Ed. 2d. 80 (1995).

To establish the requisite probability that a Petitioner is actually innocent, the Petitioner must support his allegations with "New Reliable Evidence, that was not presented at trial and must show that it was more likely than not that no reasonable juror would have convicted him in light of the New Evidence.Id.

Petitioner points out two changes from the literature of Johnson, to Herrera, and then to Schulp. One, of small relevance and the other highly significant.

First, Johnson v. Missisippi refered to, "Newly Reliable Evidence". The second relevant change, the most important, Herrera suggests that New Evidence is "evidence that was neither introduced at trial nor available to the defense to

introduce at trial", where Schulp omits "nor available to the defense to introduce at trial".

It would seem that the plain language of Schulp relaxes that portion "not available to the defense", seeing that the success of a Schulp claim is totally dependant on the ineffective assistance of trial counsel.

It appears, and is clear from the 5th Circuits order, that they adopt Herrera's wording of "New Evidence" (being neither introduced at trial nor available to the defense...), and employs it to analize its Schulp claims. See 5th Circuit Order p. 2-4, The 8th Circuit also agress with the 5th Circuits analysis on what constitutes "Newly Discovered Evidence". See Amrine v. Bowersox 128 F.3d. 1222, 1230(CA8 1997).

The 7th Circuit in Gomez v. Jarmet recognized the aforementioned dilemma indicating that in a case where the underlying constitutional violation claim is ineffective assistance of counsel premised on the failure to present evidence, a time of trial would operate as a road block to the actual innocence gateway. See Gomez v. Jarmet 350 F.3d. 673, 679-80(CA7 2003). The 7th Circuit dealt with the issue by claiming evidence is new even if it was not newly discovered evidence as long as it was not presented to the trier of facts.Id. The 3rd and 9th Circuits agree. See Houck v. Stickman 625 F.3d. 88 (CA3 2010); Griffin v. Johnson 350 F.3d. 956, 962(CA9 2003).

Petitioner will further argue that the whole State of Texas, undividedly employs the 5th Circuit Herrera analysis in its Schulp v. Delo reviews creating a road block for all Petitioner's therein to obtain the full panoply offered to use by this Court's precedent in Schulp. e.g. U.S. v. Ferrante 502 F.Supp.2d. 502(W.D. 2006), U.S. v. Abdallah 629 F.Supp.2d. 699(S.D.(Tex)2009); U.S. v. Pineda 67 F.2d. 665(E.D.(Tex)1999).

As previously stated, Petitioner submitted school records, which substantive placed the complainant at school at the time she alleged sexual assault impeaching the complainants testimony and negating one of the two predicate offenses needed by the State to prove the element of continuous course of sexual abuse 30 or more days in duration. See ROA.39. Petitioner also presented records from Suddenlink Cable Company that shows cable Tech Daniel Hernandez at Petitioner's house who, if is called as subpoena'd would testify that he and Petitioner were the only one's present in the house further impeaching the State's theory and the complainant's outcry of sexual abuse on that date bringing substantial doubt to the State's entire case of continous sexual assault of a child. See ROA.24-29. This "newly discovered evidence" is of exculpatory matter because the complainant testified that the alleged assault on (Sept. 20, 2013) happened "after breakfast, but before lunch" that Petitioner allegedly assaulted her. See ROA.598; ROA.652 line 7-18. Also Suddenlink Cable records did indicate times that Tech was at Petitioner's house on that morning, this further negating the State theory and Petitioner's trial counsel's affidavit saying that the reason he didn't present these records to the jury is because they didn't show any times on them. See COA. p. 6, line 12-17; ROA.1239-40.

Petitioner's trial counsel withheld the above exculpatory evidence from him and the jury in error, believing that the above evidence would help the State prove dates and time, where as the State had already proved at least two acts of sexual abuse occurring 30 days or more in duration. See ROA.598; ROA.729-30, creating a rare and extrodinary case of trial counsel withholding exculpatory material evidence that would support Petitioner defense. Reasonable jurist would find it wrong that the District Court concluded that Petitioner failed to present new reliable evidence to support his actual innocence claim. See Appendix B p. 6.

Regarding the ultimate question and fundamental issue...Does Petitioner's evidence constitutes newly reliable evidence under Schulp v. Delo, and should a COA issued on the merits?

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Darrell Bell

Date: November 21, 2019