No. 19-7923

Barlow Smith,

Petitioner

v.

Terry Kennedy, Director,
Burnet County Community Supervision
and Corrections Department,

Respondent

In the Supreme Court of the United States

ORIGINAL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

QUESTIONS PRESENTED FOR REVIEW

Under this Court's decisions is Petitioner actually innocent?

When there is no evidence that a crime was committed, are conviction and sentence alone a miscarriage of justice to be rectified by a federal court?

Does Petitioner's no-evidence claim merit reversal of his conviction?

The caption of the case contains all parties to this action. No corporate disclosure is required.

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CITATIONS OF REPORTS AND OPINIONS ENTERED IN THE CASE

Ex parte Smith, No. 03-17-00628-CR, 2018 Tex. App. LEXIS 3689, App.—Austin May 24, 2018) (mem. Op., not designated for publication). Petition for review was denied. *Ex parte Smith,* No. PD-0634-18, Tex Crim.App. LEXIS 681 (Crim.App. July 25, 2018)

Report and Recommendation of United States Magistrate Judge, filed May 16, 2019, Cause No. 1: 18-CV-738-LY (Smith v. Kennedy, USDC, WD Tex.)

ORDER, denying motion for certificate of appealability, USCA 5, No. 19-50487, December 18, 2019.

ORDERED that the Motion for Reconsideration is Denied, No. 19-50487, USCA 5, filed January 27, 2020

BASIS FOR JURISDICTION IN THIS COURT

The order of the United States Court of Appeals to be reviewed was entered on January 27, 2020.

No order for rehearing or extension of time was issued

There is no cross-petition.

The statute conferring jurisdiction on this Court to review on certiorari the order in question is 28 USC 1251 (1).

28. U.S.C. s 2403(b) may apply. The United States Court of Appeals has not certified that the constitutionality of a Texas statute was drawn into question.

CONSTITUTIONAL PROVISION, STATUTES, RULES AND REGULATIONS INVOLVED IN THE CASE

The due process clause of the Fourteenth Amendment to the United States Constitution .

Food and Drug Administration Drug Bulletin, April 1982

Texas Controlled Substances Act (Article 4476—15, Vernon's Ann. C. S.)

Texas Health & Safety Code, Controlled Substances Act, sec. 481.129 (c) (1)
Texas Occupation Code Title 3. Subtitle A. Chapter 107. Subchapter C.

Texas Rules of Evidence and identical Federal Rules of Evidence

STATEMENT OF THE CASE

Barlow Smith, petitioner below, appeals from the denial on May 16, 2019 by the United States District Court for the Western District of Texas of his Petition for a Writ of Habeas Corpus, Cause No. A18CV0738LY. The District Judge denied a Certificate of Appeal.

The following is the statement of the case by the district court. Report at 2:

Smith, who was a doctor and licensed attorney, was charged by indictment with three counts of fraudulent delivery of a controlled substance under Tex. Health & Safety Code, s 481.129. He acted pro se below. At trial, after a jury was empaneled and during the presentation of the State's evidence, Smith agreed to accept a plea bargain in which he pleaded guilty to the first count of the first count of the indictment and the State waived the remaining two counts.

That same morning Smith on the record Smith agreed that he had read and understood his guilty plea; that he was licensed attorney and understood the effect of the document; that he had signed it freely and voluntarily; that he had received all discovery; that he understood that he was waiving his right to proceed with a jury trial, his right to file a motion for new trial, and his right to appeal; that the plea was in his best interest; that he "was in entire agreement with" allowing all trial exhibits to be to be returned and not retained by the trial reporter; that he was not claiming to be incompetent; that he had been forced , threatened, coerced, or promised anything other than the agreement to secure his plea of guilty; and to state,"I am pleading guilty because I am guilty."

The plea was accepted and sentencing was set for the following month. One week before sentencing Smith filed a motion to withdraw his guilty plea, alleging that he had been rendered unable to defend himself by the effect on his mind of prednisone prescribed by his physician for asthma, and that he pleaded guilty to a "nonexistent crime." In support thereof he submitted for the record copies of abstracts of three scientific articles describing the cognitive and affective impairment produced by prednisone. The court denied the motion and sentenced him to five years imprisonment, suspended imposition of the sentence and placed

him on community supervision for ten years. The court ordered Smith to spend fifteen days in the Burnet County Jail as a condition of his community supervision.

Thereafter Smith filed his first application for a writ of habeas corpus, contending that he rendered ineffective counsel to himself because of the deleterious effects of prednisone prescribed for him by his physician. The district court denied the application

.

The Third Court of Appeals affirmed the district court's denial order denying habeas relief. The Texas Court of Criminal Appeals refused Smith's petition for discretionary review. *Ex parte Smith,* No. 03-16-00048-CR, 2016 Tex. LEXIS 11087, at *5 Tex. App.—Austin Oct. 122016, pet. ref'd) (mem. Op., not designated for publication).

Smith filed his second application for a writ of habeas corpus contending that he is actually innocent, that his indictment failed to charge a crime, and that the statute cited in his indictment was void for vagueness.

The district court denied Smith's second habeas application and issued as its findings of fact (*sic*) that (1) Smith's allegations regarding has actual innocence claim were unfounded; (2) Smith's complaint about his indictment should have been raised in his first post-conviction writ; (3) Smith's challenge to the constitutionality of the statute should have been raised on direct appeal or in his first post-conviction writ; and (4) Smith's application as a whole is unfounded.

The Third Court of Appeals again affirmed the district court's denial of Smith's habeas application in a memorandum opinion. *Ex parte Smith,* No. 03-17-00628-CR, 2018 Tex. App. LEXIS 3689, App.—Austin May 24, 2018) (mem. Op., not designated for publication). Petition for review was denied. *Ex parte Smith,* No. PD-0634-18, Tex Crim.App. LEXIS 681 (Crim.App. July 25, 2018).

Smith filed the instant petition under 26 U.S.C. s 2254 on August 29, 2019.

The magistrate denied Smith's free standing claim of actual innocence but did not rule on the general claim of actual innocence, although Smith provided argument of the unconstitutionally of the indictment in his case and of the underlying statute.

The magistrate also found Smith's claim that he was denied due process because the specific acts alleged in the indictment failed to specify the illegal purpose for which Smith allegedly wrote the prescriptions was correctly barred by the Third Court of Appeals barred because it was not raised in his first state habeas action and that Smith failed to provide "new" evidence (sic) to excuse the default, that the audio-visual recordings were not "new evidence."

The magistrate also found Smith's claim that Texas Health & Safety Code s 481.129 is void for vagueness because the Third Court of Appeals found the claim procedurally barred but then reached the claim on the merits in the alternative. He recommended that the Application for a Writ of Habeas be denied and that a certificate of appealability be denied.

REASONS FOR GRANTING THE WRIT

In every actual innocence case decided by this Court a crime was committed. In those cases it was not disputed that a crime had been committed. The issue was whether the petitioners in those cases were actually innocent.

Conviction and sentence when there is no evidence a crime was committed constitute an egregious injustice. When there is no evidence that a crime has been committed, actual innocence is an automatic consequence.

That the lower courts ignored such in this case is especially noteworthy where confirmation of the facts is simple and certain for a federal habeas court: the court need only secure from the District Attorney of Burnet County, Texas the audio-visual recordings which comprise the entirety of the real evidence in Petitioner's case.

The foregoing heightens the reasons why the Court should grant Petitioner's writ.

Foremost is the failure of the lower courts properly to apply the holdings of this Court which constitute the special jurisprudence in actual innocence cases. In particular, the district court and the court of appeals failed properly to address procedural default. Surely this failure commands the corrective attention of the Court.

A further reason why the Court should grant Petitioner's writ is the enormity of implications of the statement, standing alone, that conviction resulted where there is no evidence that a crime was committed. It impugns the integrity of the convicting court and the prosecutors involved, because no crime committed means no possible valid indictment and no possible valid guilty plea. The averment alone, no crime committed, should have commanded the corrective attention and action of the habeas court in Petitioner's case and, accordingly, of this Court.

The Facts

The facts are found in audio-visual recordings made by police offers posing as patients, comprising the entirety of the conduct of Smith and his employees in the case. The original recordings are in the possession of the District Attorney of Burnet County, counsel for Defendant herein.
Petitioner's abbreviated summary of the recordings is quoted by the Magistrate:

"Smith asserts "actual innocence" of the crime of conviction (sic). He alleges:

...the recordings of the patient-imposters with (Smith) are entirely bland; there is no evidence in the recordings of their consultations with (Smith) of other money changing hands; the patient-imposter paid in advance for and received a medical evaluation; that there were no offers of money or sex for drugs, admissions of addiction, pleas to assuage craving or withdrawal from drugs, very high doses of controlled substances nor issuing of multiple prescriptions to be filled each at a different pharmacy, or inappropriate behavior by (Smith) inconsistent with valid medical purpose nor implications that Appellant was part of a criminal enterprise designed to amass drugs; that the video of both patient-imposter encounters shows that (Smith's) behavior was at all times serious, professionally appropriate and devoid of artifice; that there was no conspiratorial whispering, bargaining for drugs, physical contact, inappropriate gesture or exchange of money for drugs."

Report and Recommendation of United States Magistrate Judge, hereinafter, *Report,* at 5. The Report is appended as ATTACHMENT.

Petitioner's more detailed summary of the audio-visual recordings is found in the APPENDIX hereto.

The trial court held no hearing yet found the claim of actual innocence unfounded, as did the state appellate courts and the District Court, rejecting the claim of actual innocence without considering the actual evidence, citing procedural default despite the entirety of the evidence, indisputable and easily accessible, being preserved in audio-visual recordings in the possession of the District Attorney of Burnet County, Texas,

The federal magistrate found against Petitioner's claim of actual innocence, citing *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, 12 L.Ed.2d 203 (1993), but Petitioner did present constitutional violations as bases of his conviction: invalid indictment and statutory void for vagueness.

Although his Petition was broadly based, in his Brief Smith argued only "free standing" claim of actual innocence. In the appendix to his Brief he did argue the constitutional violations of invalid indictment and unconstitutional statute in his claim of actual innocence pursuant to the requirements of *Murray v. Carrier*. The magistrate found this issue barred.

REVIEW OF A STATE COURT JUDGMENT

None is sought herein.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

Jurisdiction in the United States District Court is 26 U.S.C. s. 2254.

ARGUMENT

Actual Innocence

The two fundamental requirements of actual innocence jurisprudence are established by *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 1, 91 L.Ed. 397 (1987): first, factual actual innocence; second, a constitutional violation which contributed to

the wrongful conviction. Specific applications thereof to Petitioner's case are found in ERRORS MADE BY THE COURT OF APPEALS and ERRORS MADE BY THE DISTRICT COURT below.

The facts in Petitioner's case are fixed by the evidence presented in the State's discovery: the prescriptions themselves, the medical charts generated and the five audio and video recorded discs which comprise the entirety of the contacts between Petitioner and his employees and the undercover agents posing as patients. The only other direct evidence is the brief testimony of one of the patient-imposters.

A stenographic transcription of the clinical interviews of the patient-imposters with Petitioner was prepared by the District Attorney's office.

The recordings are correlated as to date and hour with the transcription.

The summary below is derived from the above sources.

> ...(T)he recordings of the patient-imposters with (Petitioner) are entirely bland; there is no evidence in the recordings of their consultations with (Petitioner) of other money changing hands; the patient-imposter paid in advance for and received a medical evaluation; that there were no offers of money or sex for drugs, admissions of addiction, pleas to assuage craving or withdrawal from drugs, very high doses of controlled substances nor issuing of multiple prescriptions to be filled each at a different pharmacy, or inappropriate behavior by (Petitioner) inconsistent with valid medical purpose nor implications that Appellant was part of a criminal enterprise designed to amass drugs; that the video of both patient-imposter encounters shows that (Petitioner's) behavior was at all times serious, professionally appropriate and devoid of artifice; that there was no conspiratorial whispering, bargaining for drugs, physical contact, inappropriate gesture or exchange of money for drugs.

Report at 5, quoted above.

This summary is exceedingly broad and detailed and, unless strictly true, easily controverted by a single credible datum of criminal conduct. The State never undertook to do that.

Standard of Proof

Considering the foregoing negation of criminal conduct by Petitioner "no juror acting reasonably would have voted to find him guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298 at 328 (1995).

The Constitutional Violation

Sec. 481.129 (c) (1) is void for vagueness

The trial court erroneously held that this issue is barred because it was not presented in applicant's first writ application.

The constitutional issue of void-for–vagueness statute like that of failed indictment is a causal element. It is a denial of due process contributing to the conviction of one actually innocent in accordance with *Murray v. Carrier* .Accordingly, like failed indictment it shares avoidance of the state procedural bar against subsequent writ applications of Texas Code of Criminal Procedure, Art. 11.072, Sec. 9. *Emery v. Johnson*, 940 F. Supp. 1046

S. D. Tex. 1996), Case No.19-50487.

The Supreme Court defines void for vagueness

In *Palmer v. City of Euclid*, 402 U.S. 544 at 545, 617, 91 S.Ct. 1563, 29 L.Ed.2d 98 (1971), the Supreme Court reversed the judgment against defendant "because the ordinance is so vague and lacking in ascertainable standards of guilt that, as applied to Palmer, it failed to give "a person of ordinary intelligence fair notice that his contemplated conduct is forbidden...", citing United *States v. Harris,* 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed.2d 989 (1954).

The unconstitutionality is judged by application to the facts of Petitioner's case.

'When the First Amendment is not implicated, a void for vagueness challenge must be unconstitutional as applied to the defendant and "must be examined in light of

United States v. Pungitore, 910 F.2d 1084, 1104 (3d Cir. 1990).

> "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his conduct is proscribed. *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 98 L.Ed.2d 989 (1954)."

United States v. National Dairy Products Corp. 372 U.S. 29 at 32, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963)

sec. 481.129 (c) (1) makes a normally innocent act criminal

Appellant prescribed phentermine. The manufacturer's indication for this medicine is obesity. Physicians' Desk Reference, 64th Edition, 2010 at 1178. The medical chart in the case suggests that the undercover patient was not obese. This could imply that Appellant prescribed improperly and, hence, for other than a valid medical purpose; but this implication is negated below.

Likewise, prescription of controlled substances by Smith, a psychiatrist, is shown below to be legal.

The meaning of *valid medical purpose* hinges upon the meaning of *valid*.

"...(W)ords not defined are to be given their plain meaning. In determining the plain meaning of a word, we initially look to dictionary definitions." *State v. Holcombe,* 187 S.W.2d 496 at 500 (Tex.CrimApp. 2006), citing *Parker v. State*, 985 S.W.2d 460 (Tex.CrimApp. 1999), and *Ex parte Rieck*, 144 S.W.3d 510 (Tex.CrimApp. 2004); *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon,* 515 U.S. 687 at 697, 115 S.Ct. 2407, 132 L.Ed. 644, 63 U.S.L.W. 4665 (1995)

Webster's Third New International Dictionary Unabridged 1986 defines

Valid ...

1 a: having legal strength or force: incapable of being rightfully Overthrown...**2 a**: well grounded or justifiable: applicable to the matter at hand: PERTINENT, SOUND ...**b** capable of measuring, predicting ...**3 a** : able to effect or accomplish what is designed or intended: EFFECTIVE, EFFICACIOUS ...**4 a** : STRONG, POWERFUL ...**b** HEALTHY, ROBUST **5 a** *of a taxon..*

Syn : SOUND, COGENT, CONVINCING...

The prescription for Phentermine was legal per FDA pronouncement.

Phentermine evidently was prescribed for weight reduction but not for obesity, a word never mentioned in the evidence in Petitioner's case. Meaning **3.** for *valid* could signify questionable legality; but the Food and Drug Administration has unequivocally stated in its online publication that off label prescribing is perfectly legal and, in fact, is common. Use of Approved Drugs for Unlabeled Indications, FDA Drug Bulletin, April 1982. (And see numerous medical articles referenced online via PUBMED for the breadth and variety of off label prescribing.) The statute thereby would make criminal what federal authority declares legal, an outcome condemned by the Supreme Court in *Papachristou v. City of Jacksonville,* 405 U.S. 156 at 163, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972):
"The Jacksonville ordinance makes criminal activities which, by modern standards, are normally innocent."

Statutory terms of sec. 481.129 (c) (1) applied to Petitioner's case are vague.

Appellant prescribed hydrocodone in a dose well within recommendations. U.S. Pharmacopeia. Using the meaning **3a,** efficacious, for *valid,* is the dose prescribed by Appellant adequate for the pain complained of? The patient-imposter in Appellant's case did not state whether the pain was or was not relieved. Expert testimony might demonstrate that the dose is not efficacious and, therefore, criminal.

sec. 481.129 (c) (1) gives no notice of the allegedly criminal act

The same applies to the prescription for phentermine. In either case the defendant has no notice of what is his putative criminal conduct, the predicament denounced in *Boule v. City of Columbia,* 378 U.S. 347 at 351, 84 S.Ct. 1697, 12 L.Ed.2d 894(1964), citing *Harriss, supra.*

The facts in Appellant's case show no physical examination was performed to prescribe hydrocodone. The issue of physical examination was declared inadmissible in cases prosecuted under the prior statute similar to sec. 481.129 (c) (1), *viz.,* Section 3.01(b) *et seq.,* Controlled Substances Act (Article 4476—15, Vernon's Ann. C. S.): *Haney v. State,* 544 S.W.2d 384 (Tex.Crim.App. 1976). The

vagueness of the statute would make criminal conduct which the Court of Criminal Appeals would protect.
(The Ninth Court of Appeals stated that the legislature had rectified the inadmissibility, citing only sec. 481.129 (c) (1) verbatim. *Ford v. State*, 676 S.W.2d 609 at 611 (Tex.App.--Beaumont 1984); but there is no language in the present statute to confirm the court's statement.)

sec. 481.129 (c) (1) makes a normally innocent act criminal

Appellant practiced psychiatry. In the instant case he treated a non-psychiatric complaint, pain. Such is not *typical* of psychiatric practice. Webster's Collegiate Dictionary definition **7** for *course*, thus, would make Petitioner's conduct criminal. But, the Texas Occupation Code authorizes physicians to treat pain without limitation by specialty:

Title 3. Health Professions
Subtitle A. Provisions Applying to Health Professions Generally.

Chapter 107. Intractable Pain Treatment
Subchapter C. Treatment of Certain Patients s. 107.102. Authority to Treat

This chapter authorizes a physician to treat a patient with an acute of chronic painful condition with a dangerous drug or controlled substance to relieve the patient's pain using appropriate doses, for an appropriate length of time, and for as long as the pain persists.

The statute does not limit its authority to treat to a particular specialty. Thus, the vagueness of sec. 481.129 (c) (1) in Appellant's case makes criminal what another statute says is lawful.

It places almost unfettered discretion in the hands of the prosecutor.

"(The ordinance...) makes criminal activities that, by modern standards, are normally innocent, and it places almost unfettered discretion in the hands of the police."
Papachristou, supra, 131-171.

In the case of either prescription use of the definition, *well-grounded,* for *valid* might impugn the basis for prescriptions. The prosecution could assert that, since a correct diagnosis or condition is required for treatment with a drug, prescription or any treatment must be based on a diagnosis, which is arrived at variously: history, physical examination laboratory and radiology. The vagueness of the statute allows the prosecution with this definition to show that any of these bases of the prescriptions were not valid. Petitioner has no notice which basis was invalid.

"Engrained in our notion of due process is the requirement of notice."
Lambert v. California, 355 U.S. 225 at 228, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957).

The lack of notice violates due process of law.

The lack of notice to defendant would allow the prosecutor to target some feature of the diagnostic process in arriving at a basis for a prescription in Appellant's case. Since there is no evident misconduct apparent in the evidence in his case, this vagueness gives no notice to Appellant what feature of his case may potentially be criminal conduct.

"A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first principle of due process of law." *Boule, supra,* at 351.

It is evident that any aspect of the diagnostic preparation of the prescriptions in Appellant's case can be the focus of prosecutorial, attack, a broad expanse from which the prosecutor can choose without notice to the defendant. *Papachristou, supra.*

The indictment is likewise is rendered defective by this vagueness.

> Although an indictment that tracts the statutory language defining an offense is usually sufficient, mere recitation of statutory language will only save an indictment if all elements are subsumed in the language. In *United States v. Carll*, 105 U.S. 611 (1881) the indictment followed the language of the statute but was

found insufficient for failure to allege that the defendant knew that the instruments he uttered were forged or counterfeited. As the Court pointed out:

> [I]t is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.
>
> *Id.* at 612. "An indictment that tracks the words of the statute violated is generally sufficient, but implied, necessary elements, not presented in the statutory language, must be included. . . ."
>
> The rule reiterates the Court's views in *United States v. Cruikshank*, 92 U.S. 542, 558 (1875):
>
> It is an elementary principle of criminal pleading, that where the definition of the offense, whether it be at common law or by statute, "includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must descend to particulars.
>
> *See also United States v. Simmons*, 96 U.S. 360 (1877).

Department of Justice Criminal Resource Manual: 225 Charging in the Language of the Statute

Additionally, the indictment is defective because the statute which it tracks is unconstitutionally vague. *White v. State*, 440 S.W.2d 660, (Tex.Crim.App. 1969). In *White* the trial court denied defendant's motion to quash the indictment. The Court of Criminal Appeals reversed, holding that the governing statute was unconstitutionally vague.

The district court held that Petitioner was procedurally barred from arguing the invalidity of the indictment, but no, or an invalid, indictment deprives the trial court of jurisdiction. Report at However, "it is well settled that a valid indictment, or information if indictment is waived, is essential to the district court's jurisdiction in a criminal case." *Garcia v. Dial*, 524, 527 S.W.2d 496 (Tex.Crim.App. 1980); and failure of subject matter may be asserted at any time.

THE NO-EVIDENCE CLAIM

Petitioner's claim that no crime was committed in his case constitutes a no-evidence- of-guilt claim. Such may be asserted at any time:

> Texas law permits a defendant to raise a "no evidence" claim for the first time on collateral review where the conviction is totally devoid of any evidentiary support. See *Ex parte Barfield*, 679 S.W.2d 420, 421 (Tex.Crim.App. 1985); *Ex parte Coleman,* 559 S.W.2d 305 (Tex.Crim.App. 1978).

Coker v. Thaler, 670 F.Supp.2d 541 (2009) at 550, fn.3.

In both *Barfield* and *Coleman,* the Court of Criminal Appeals reversed the conviction.

Furthermore, conviction on no evidence constitutes a violation of due process.

> "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never trid(sic) as it would be to convict him upon a charge that was never made."

Cole v. Arkansas, 333 U.S. 196 at 201, 68 S.Ct. 514, 92 L.Ed. 644 (1948).

'..."(C)onviction upon a charge not made would be sheer denial of due process.," '

Thompson v. City of Louisville, 362 U.S. 199 at 206, 80 S.Ct. 624, 4 L.Ed 2d 654 (1960), citing , *Cole, supra.*

> Lest there be any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

In re Winship, , 397 U.S. 358 at 364 (1970).

Manifestly, when there is no evidence that a crime has been committed, proof beyond a reasonable doubt is impossible.

It might be argued that Petitioner's guilty plea is evidence of guilt to defeat his no-evidence contention.

In the Report at 2, fn. the magistrate quotes from Petitioner's guilty plea. Perusal thereof reveals that it states no facts of criminal import, that is, no factual conduct, but is merely a litany of conclusory responses fed to Petitioner. His responses are passive and compliant. They provide no substantive evidence of guilt. Cf Report at 2. A factually empty guilty plea is not evidence of a crime. It is a mere *mea culpa*.

ERRORS MADE BY THE COURT OF APPEALS

The Court held that petitioner failed to make "substantial showing of the denial of a Constitutional right," citing *Slack v. McDaniel*, 529 U.S. 473, 483 (2000).

Petitioner's analysis of the unconstitutionality of the statute constituted meticulous application of the opinions of this Court. Surely, it demonstrated that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues [presented are adequate to proceed to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 37 U.S. 322 327 (2003)

The Court of Appeals at 2 cited the district court's bar to Petitioner's claim of unconstitutionality of the statute, completely ignoring this Court's actual innocence decisions. Procedural default is covered below.

ERRORS MADE BY THE DISTRICT COURT

The district court cited, Report at 6, case authority for procedural default by Smith, e.g., the requirement of an adequate justification for the default to avoid forfeiting a claim, ignoring *Carrier* and *McQuiggin*, inter alia, which unmistakably state that an actual innocence claim shall be entertained by the Court *despite* procedural default.

> Accordingly, we think that, in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.

Murray v.Carrier at 496-7.

McQuiggin at 393 lists some of the defaults: "successive" petitions asserting previously rejected claims, "abusive" petitions asserting in a second petition claims that could have been raised in a first petition, failure to develop facts in state court, failure to observe state procedural rules. This Court has further clarified this point:

> ...We have not determined whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence. *Herrera v. Collins*, 506 U.S. 390, 404-405 (1993) We have recognized, however, that a prisoner "otherwise subject to defenses of abusive or successive use of the writ[of habeas corpus] may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence." *Id.* at 404 (citing *Sawyer v, Whitley,* 505 U.S. 333 (1992). See also *Murray v. Carrier*, 477 U.S. 478, 496 (1986) ([W]e think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." In other words, a credible showing of actual innocence may allow may allow a prisoner to pursue his constitutional claim exception, is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons.

Herrera, 506 U.S. at 404.

All of the above should have been applied to the defaults in Petitioner's case. Instead, the district court avoided confronting the miscarriage of justice as follows.

The district court cited the 1996 Antiterrorism and Effective Death Penalty Act as authority interdicting Smith's Petition, Report at 4; but the Supreme Court has squarely held that the Act does not control the disposition of its cases. *McQuiggin at 1022, 1023. Carrier* and its progeny govern the disposition of actual innocence cases in federal court.

On page 7 of the Report the magistrate found that Petitioner's claim of unconstitutionality of the statute was barred as an independent and adequate ground barring federal review.

> Smith contends Texas Health & Safety Code s 481.129(c)(1) is void for vagueness. The Third Court of Appeals found this claim both claim procedurally barred and without merit. Even when a state court finds a claim procedurally barred but then reaches the merits of that claim in the alternative, the state court's reliance on the procedural default still constitutes an independent and adequate ground which bars federal habeas review. * * *

The Third Court of Appeals specifically addressed default at page 7 of its opinion.

The Report cited the opinion of the Third Court of Appeals:

> * * * Smith failed to raise challenge to vagueness of statute in his prior habeas application, and he provides no explanation why this challenge to the statute could not have been presented beforehand. See id. *Ex parte Beck*, 541 S.W.3d 846, 859-60 (Tex. Crim. App. 2017). The statute that Smith challenges in his second habeas application has not been declared unconstitutional. *Cf. id.* We overrule Smith's third issue.

Ex parte Beck at 852 deals with failure to assert a claim previously. It does not address the independent-state-ground issue.

(The reference by the Third Court of Appeals to the statute not being declared unconstitutional refers to an excuse for the default not offered by Smith. It is irrelevant.)

The Report cites *Harris v. Reed,* 489 U.S. 255 (1989) in support of its ruling. In fact, *Harris* provides the opposite conclusion:

> Applying the "plain statement "requirement in this case, we conclude that the Appellate Court did not 'clearly and expressly' rely on waiver as a ground for rejecting any aspect of petitioner's ineffective-assistance-of-counsel claim. Michigan v. Long, 463 U.S., at 1041. To be

> sure, the state court perhaps laid the foundation for such a holding by stating that most of petitioner's allegations "could have been raised on direct appeal." App. 12. Nonetheless, as the Court of Appeals recognized, this statement falls short of an explicit reliance on a state law ground. 13 Accordingly, this reference to state law would not have precluded our addressing petitioner's claim had it arisen on direct review. As is now established, it also does not preclude habeas review by the District Court.

Id. at 266. Note the similarity of the quote above, "could have been raised on direct appeal," to the language of the Third Court of Appeals, "...could not have been presented beforehand."

Furthermore, contrary to the magistrate's statement on p. 7 of the Report the Third Court of Appeals did not rule on the merits of the claim.

The foregoing excerpt of the Third Court of Appeals devolves to one of those defaults despite which "a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Murray v. Carrier*, 477 U.S. 478 at 496, 106 S. Ct. 2639, 91 L. Ed. 397 (1987). The Report, thus, should have ignored such default. Smith was seriously prejudiced because he is thereby prevented from presenting a mandatory element of his actually innocent claim, an unconstitutional violation which has probably resulted in the conviction of one who is actually innocent.

The district court, Report at 6, erred in holding that Petitioner's issue of void indictment should have been presented previously and was therefore barred. That issue was not presented as a new claim but rather as a component of his actual innocence claim, the constitutional violation which contributed to the conviction.

As detailed above, this default would not be a bar under The *Murray v. Carrier*.

The district court erred in not granting a hearing. Petitioner's assertion of the (inchoate) evidence of the actual events in his case in contrast with the facts recited by the district court constitute compelling reason for granting a hearing. *Townsend v. Sain*, 372 U.S. 293 at 313 (1963)

Although this Court has never allowed a free standing actual innocence claim, the facts of Petitioner's claim, *supra* and Appendix, compel such, since void indictment is established as a logical consequence.

COMMENT

Because the trial court held no hearing in Petitioner's first habeas action, no appellate court considered the audio-visual recordings, because they were never admitted into evidence. On remand they would be readily obtained from the District Attorney of Burnet County, Texas pursuant to Rule 16, Federal Rules of Criminal Procedure.

No hearing had been held by any of the lower courts in Petitioner's case. The district court held that the audio-visual recordings could not be considered since they were not new evidence. Nevertheless, the district court should have held a hearing:

> Therefore, where an applicant for a writ of habeas corpus alleges facts which, if proved, would entitled him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew.
>
> **III.**
>
> We turn now to the considerations which in certain cases may make exercise of that power mandatory. The appropriate standard - which must be considered to supersede, to the extent of any inconsistencies, the opinions in Brown v. Allen - is this: Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding. In other words a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts.

Townsend v. Sain, 372 U.S. 293, 317-318(1963)

SUMMARY

Petitioner's proof of actual innocence easily meets the *Schlupp* standard in such cases.

The district court should have held a hearing.

The constitutional violation required by *Carrier* is demonstrated in two ways: case analysis applying this Court's opinions and direct reasoning from the fact that no crime was committed.

There is no requirement for new evidence in Petitioner's case, because the audio-visual recordings, comprehensive and indisputable, suffice and are not precluded by default. That the recordings were never introduced into evidence is no obstacle to considering them: *McQuidden, supra*, at 303 lists "failure to develop evidence in state court" as one of the defaults to be overlooked in judging an actual innocence claim.

Detailed application of state law established Petitioner's right to reversal under the no-evidence rule, available at any stage of the proceedings.

In the unique circumstances of this case, when there is no evidence that a crime was committed, conviction and sentence alone constitute a miscarriage of justice to be rectified by a federal court.

PRAYER

May this Court grant Petitioner's writ of habeas corpus.

Respectfully submitted,

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