No. 19-8128

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

BOBBY JOE BUCKNER — PETITIONER
(Your Name) Pro Se

vs.

LORIE DAVIS
Director — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE FIFTH CIRCUIT COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

BOBBY JOE BUCKNER # 1740805
(Your Name)

ESTELLE UNIT - 264 FM 3478
(Address)

HUNTSVILLE, TX. 77320
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Did the Fifth Circuit err in it's application of the implied bias doctrine by stating that this case is outside the "extreme genre of cases" to warrant implied bias?

2. Did the Fifth Circuit err by not ordering an Evidentiary Hearing to expand the record?

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:

Texas Department of Criminal Justice
Correctional Institutions Division
Director - Lorie Davis
P.O. Box 99
Huntsville, Tx. 77342

Assistant Attorney General of Texas
Casey Solomon
P.O. Box 12548, Capitol Station
Austin, Tx. 78711
(512) 936-1400

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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

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

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

[✓] reported at NO. 17-50891; 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[ ] is unpublished.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 D to the petition and is

[✓] reported at USDC NO. 6:15-cv-177; 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[ ] is unpublished.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[ ] is unpublished.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[ ] is unpublished.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 _____.

[ ] 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: February 24, 2020, and a copy of the order denying rehearing appears at Appendix A.

[ ] 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).

[ ] 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

The following statutory and constitutional provisions are involved in this case.

U.S. CONST., AMEND. VI

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 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 defense.

28 U.S.C. § 2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that --

(A) the applicant has exhausted the remedies available in the courts of State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits,

notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that --

(A) the claim relies on --

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substance Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under

this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

STATEMENT OF THE CASE

On July 15, 2011, BOBBY JOE BUCKNER was convicted of Aggravated Sexual Assault of a Child by a jury in McLennan County, Texas and sentenced to fifty years of imprisonment.

In Buckner's case, he alleged that he did not get a fair trial by an impartial jury "that the Sixth Amendment guarantees" due to juror R.H.'s family history of sexual abuse and his failure to disclose his personal history of sexual abuse. Buckner was convicted of Aggravated Sexual Assault of a Child with only victim testimony and no physical evidence. R.H.'s presence on the jury most definitely effected the outcome of Buckner's trial.

Trial counsel John Donahue, exercising the necessary diligence, asked R.H. if he or any family members had ever been a victim of Aggravated Sexual Assault or a similar crime. R.H. made no attempt to reveal his personal family history. The panel were told that if they wanted to discuss anything privately with the court, they could do so. R.H. did not speak up, nor did he request a private conference with the court. R.H. was then selected as a member of the jury.

After being selected for jury duty and sworn in, R.H. asked to speak to the judge. In chambers and on the record, R.H. confessed that his step-sister had been sexually abused by his father, but this would not impact his ability to be fair and impartial in Buckner's trial. R.H. was very emotional regarding the confession. ("It seems to be an emotional situation for you." "It is. It really is.")(Page 20, District Court Order; 3 RR 127-132) R.H., however, failed to mention that he himself had been sexually abused by his father and had also been kidnapped and nearly sexually assaulted on another occasion.

It was only after Buckner's trial and conviction that defense counsel John Donahue, learned of R.H.'s abuse, and then filed a sworn affidavit stating he

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Note: R.H. is how the court refers to juror # 2 - Ryan Honea.

had learned R.H. himself had been a victim of sexual abuse and had this information been available at trial he would have challenged him for cause and if R.H. had persisted that he would be fair and impartial in Mr. Buckner's trial, he would have exercised a peremptory challenge against him. (See Exhibit A)

Trial counsel filed a Motion for New Trial along with his sworn affidavit on August 11, 2011, in an effort to get Buckner a new trial based on the facts he learned after trial.

EXHIBIT A

AFFIDAVIT OF BUCKNER'S TRIAL COUNSEL

EXHIBIT A

EXHIBIT A

No. 2009-385-C2

STATE OF TEXAS	§	IN THE DISTRICT COURT OF
	§	
v.	§	McLENNAN COUNTY, TEXAS,
	§	
BOBBY JOE BUCKNER	§	54th JUDICIAL DISTRICT

AFFIDAVIT OF JOHN DONAHUE, TRIAL COUNSEL FOR DEFENDANT BOBBY JOE BUCKNER

STATE OF TEXAS
COUNTY OF McLENNAN

Before me, the undersigned authority, on this day personally appeared John Donahue who, after being duly sworn, stated as follows:

1. I am an attorney licensed by the State Bar of Texas. I represented Bobby Joe Buckner, the defendant in the above-styled and numbered cause in which the State of Texas proceeded against Mr. Buckner under an indictment for aggravated sexual assault of a child. A jury convicted Mr. Buckner of this offense on July 15, 2011. The trial court assessed his punishment at 50 years' imprisonment and imposed sentence on the same day.

2. During voir dire, the veniremembers were asked if they or any family members had ever been a victim of aggravated sexual assault of a child or a similar crime. After the petit jurors were selected, sworn and impaneled, one of them, Mr. Brody Honea, asked to speak to the judge privately. In chambers and on the record, Mr. Honea advised that his step-sister had been sexually abused by his father. Mr. Honea stated that this would not impact his ability to be fair and impartial in Mr. Buckner's trial.

3. After trial, I learned that Mr. Honea himself had been sexually abused by his father, and on another occasion had been kidnapped and the victim of an attempted sexual assault. If he had disclosed this information, I would have asked whether he could set his feelings aside about that and be fair and impartial in Mr. Buckner's trial, in an effort to challenge him for cause. If Mr. Honea had persisted that he would be fair and impartial in Mr. Buckner's trial, I would have exercised a peremptory challenge against him.

John Donahue

SWORN TO AND SUBSCRIBED BEFORE ME this 8 day of August, 2011.

AMANDA LEE NEILL
Notary Public, State of Texas
My Commission Expires
May 05, 2014

Notary Public, State of Texas

REASONS FOR GRANTING THE PETITION

1. THE FIFTH CIRCUIT MISAPPLICATION OF THE IMPLIED BIAS DOCTRINE WARRANTS THE COURT'S ATTENTION.

The Fifth Circuits opinion misapplied the implied bias doctrine which is clearly established precedent. First, Buckner argues that the implied bias doctrine is a function of clearly established Supreme Court law. Justice O'Connor in Smith v. Phillips, 455 U.S. 209, 222 (1982) touches on issues relevant to this instant case.

> "Determining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it. The problem may be compounded when a charge of bias arises from juror misconduct, and not simply from attempts of third parties to influence a juror."

Also:

> "I am concerned, however, that in certain instances a hearing (post conviction) may be inadequate for uncovering a juror's biases, leaving serious questions whether the trial court had subjected the defendant to manifestly unjust procedures resulting in a Miscarriage of Justice. While each case must turn on it's own facts, there are some extreme situations that would justify a finding of implied bias. Some examples might include a revealation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants, etc. Whether or not the state proceedings result in a finding of "no bias," the Sixth Amendment right to an impartial jury should not allow a verdict to stand under such circumstances." Id @ 222.

The Fifth Circuit itself has found the implied bias doctrine to be clearly established law in Brooks v. Dretke, 444 F.3d 328, 329-33 (CA 5 2006). Further support for this argument is found in U.S. v. Gonzalez, 214 F.3d 1109 (2000), where the Ninth Circuit offered an indepth and clarifying opinion regarding juror implied bias.

> "The Sixth Amendment guarantees criminal defendants a verdict by an impartial jury. The bias or prejudice of even a single juror is enough to violate that guarantee. Accordingly, the presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice." Id @ 1111.

The court goes on to state,

> "We have found implied bias in cases where the juror in question has had some personal experience that is similar or identical to the fact pattern at issue in the trial or where the juror is aware of highly prejudicial information about the defendant." Id @ 1112.

United States v. Allsup, 566 F.2d 68 (9th Cir. 1977) states:

> "Although bias can be recealed by a juror's express admission of that fact, ... more frequently, jurors are reluctant to admit actual bias, and the reality of their biased attitudes must be revealed by circumstantial evidence."

United States v. Torres, 128 F.3d 38, 43 (2nd Cir. 1997) states:

> "In essence, actual bias is "bias in fact" the existance of a state of mind that leads to an inference that the person will not act with entire impartiality."

Dyer v. Calderon, 151 F.3d 970 (9th Cir. 1998) states:

> "Even if the putative juror swears up and down that it will not affect his judgment, we presume conclusively that he will not leave it at the jury room door."

In Buckner's case, the intentional omission of Venireman R.H.'s prior victimization is obviously material to his ability to be fair and impartial as a juror on an Aggravated Sexual Assault case. Moreover, his reluctance to admit that his step-sister was abused, by his own father, indicates at least embarrassment, and more than likely deep seated feelings over allegations of this nature. The apparent pervasiveness of abuse in R.H.'s life makes it highly unlikely that he would remain impartial. R.H.'s extreme emotional state in chambers, his admitted embarrassment, his silence during Voir Dire, and his reluctance to disclose in chambers all combine to show a failure to remain

impartial and unbiased. The statement by defense counsel (who is a former prosecutor and who's affidavits have previously been found to be credible) stated that he learned more after the fact solidly support the conclusion that R.H. implied bias in Buckner's case. Juror R.H. lied by omission during Voir Dire, despite opportunities to speak privately with the court and counsel. Counsel was deprived the opportunity to challenge for cause or exercise a peremptory challenge. Defense counsel diligently pursued the information. Thus, Buckner's right to an impartial and unbiased jury, as guaranteed by the Sixth Amendment, was violated.

2. THE FIFTH CIRCUIT ERR BY NOT ORDERING AN EVIDENTIARY HEARING

Buckner has persistently requested an Evidentiary Hearing in state and federal habeas proceedings in order to expand the record.

The Federal District Court and the Fifth Circuit, denied Buckner relief because, he had failed to show juror R.H. was bias. Buckner can only show implied bias without an Evidentiary Hearing. It is a Miscarriage of Justice for the court to demand evidence of bias, while withholding the only means for a petitioner who is incarcerated to do so. An Evidentiary Hearing is imperative due to juror R.H. being a minor at the time of his and his step-sister's abuse and thus records are sealed and unavailable to Buckner. Also an Evidentiary Hearing would have made clear any doubts the court has about trial counsel's sworn affidavit about juror R.H. being a victim of sexual abuse.

Trial counsel John Donahue, who is a known and credible officer of the court diligently pursued the information about juror R.H. and thus his sworn affidavit alone should have been enough to justify an Evidentiary Hearing at the very least.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit Court of Appeals.

Respectfully Submitted,

Bobby Joe Buckner

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