No. 20-5516

IN THE SUPREME COURT OF THE UNITED STATES

Joseph Peter Garbarini,
Petitioner

v.

Lorie Davis,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE FIFTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the Fifth Circuit err in denying a certificate of appealability on a double jeopardy claim reasoning that I am procedurally barred when a debate exists between the federal judges on this issue (i.e. the district court found I am not barred while a circuit judge, sua sponte, denied the COA overturning the district court, and another circuit judge dissented agreeing with the district court that I am not barred)?

Did the Fifth Circuit err in denying a certificate of appealability on the claims addressing: double jeopardy, a non-unanimous verdict, due process violations, and ineffective assistance of counsel? Will the Supreme Court review the denial of the COA while considering how the Court can help clarify when an appellant has satisfactorily shown that a reasonable juror could disagree with the district court's decision?

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I, the petitioner, respectfully ask that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The opinion of the magistrate judge and district judge of the United States District Court - Eastern District of Texas, case #4-16-CV-00198, appears at Appendix 1a and 29a respectively and is unpublished.

The order of the Fifth Circuit Court of Appeals denying a certificate of appealability appears at Appendix 30a and is unpublished.

JURISDICTION

The United States Court of Appeals decided my case on December 13, 2019.

The United States Court of Appeals denied a timely petition for rehearing on March 2, 2020, and a copy of the order appears at Appendix 33a.

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

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST., AMEND V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

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 defence.

U.S. CONST., AMEND. XIV

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

This case arises from a complaint made in May 2010 by Clarissa Turner, mother of 5-year-old S.T., who was one of my students during my employment as a kindergarten teacher with the Plano ISD. On May 19th, Ms. Turner accused me of molesting her daughter. On May 24th, Robyn Miller, mother of 6-year-old M.P., also a student, made a similar accusation. Following a trial, a jury found me guilty of Continuous Sexual Abuse of a Child and Sexual Performance by a Child.

After exhausting my state remedies, I filed a motion for a writ of habeas corpus under 28 U.S.C. §2254 with the United States District Court. I sought relief by bringing claims of double-jeopardy, due process, and ineffective assistance of counsel. The State responded to an order to show cause why my motion should be denied in which the State argued the double jeopardy claim was procedurally barred for failure to exhaust and the remaining claims should be denied. I filed a traverse in which I argued I exhausted the double jeopardy ground in the State and demonstrated with sufficient evidence I was entitled to relief on the remaining grounds.

The magistrate judge first found that I was not procedurally barred on the double jeopardy claim (App. 4a). After review of each claim however, the magistrate recommended the motion be denied (App. 27a). Both the State and I filed objections to the report and recommendation.

The district judge found the "objections [were] without merit" and denied the motion for a writ of habeas corpus (App. 29a). I subsequently filed a notice of appeal and a motion for a COA with the Fifth Circuit. The State did not appeal.

A circuit judge denied a COA on the double jeopardy claim ruling I am procedurally barred (App. 31a). I filed a motion for rehearing. The court again denied a COA, though one judge dissented stating I was not procedurally barred (App. 36a). Each judge denied a COA for the other claims without explanation.

I believe I have shown clear and convincing evidence in support of each claim; enough at least that any reasonable juror could argue the district court's decision is debatable. Therefore, I believe the Fifth Circuit erred in denying my COA and I ask this Court to grant a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. The Supreme Court should exercise its supervisory power and review the Fifth Circuit's denial of a certificate of appealability (COA) where a debate exists between 5 federal judges.

I have raised a claim that my conviction violated my right against double jeopardy. The State argued that I am procedurally barred from raising this claim. Both the magistrate judge and district judge ruled I am not barred, describing the State's argument as "without merit" (App. 4a,29a). However the court did deny the claim on other grounds, and I sought a COA from the Fifth Circuit.

Circuit Judge Oldham denied a COA on the double jeopardy claim reraising, sua sponte, this issue of a procedural bar (App. 31a). On a motion for rehearing, a second judge joined that opinion, but a third dissented (App. 35a). There are two important issues I ask this Court to address.

First, whether I am procedurally barred or not, federal law only requires that I obtain a COA from a (singular) circuit judge or justice. 28 U.S.C. §2253(c)(1). In this case, Circuit Judge Higginson writes that he would grant a COA:

> I agree with the Magistrate judge and district court judge that Garbarini's double-jeopardy claim is not procedurally barred because he exhausted it before the state habeas court. ...
>
> Because Garbarini's application for a COA on his double-jeopardy claim is not procedurally barred, I would consider the merits of the application.
>
> (App. 35a,36a)

Had my motion for a COA originally gone before Judge Higginson instead of Judge Oldham, the motion would have been granted on the double jeopardy claim. If Judge Higginson would grant the COA, and I only need a single circuit judge to do so, why was a COA not issued?

Second, can a circuit judge deny a COA because he disagrees with a decision of the district court - even when neither party has challenged that decision? The State had an opportunity to file an appeal or respond to my motion for a COA and chose not to. I did not raise the issue of a procedural bar.

Judge Oldham is effectively reasserting and arguing the State's position for them, simultaneously finding in their favor and denying me to opportunity to brief and argue I am not procedurally barred. This violates the accepted and usual course of judicial proceedings.

Because it ties in with reason II, I must point out an incongruity in this situation. All these judges are (presumably) reasonable jurors. Yet, the magistrate judge and district judge found I am not procedurally barred and that no reasonable juror could debate otherwise (App. 27a,29a). Two circuit judges found I am procedurally barred and that no reasonable juror could debate otherwise (App. 31a). A third judge agrees with the district court. Someone is being unreasonable.

This situation occured because the finding that a "district court's decision is debatable" is entirely subjective. This is the point I wish to raise in reason II.

II. Both appellants and the court of appeals would benefit from additional guidance this Court can provide on what constitutes a successful argument that a district court's decision is debatable.

This Court has determined that at the COA stage, the only question is whether the applicant has shown 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 deserve encouragement to proceed further."[1]

"A court of appeals should limit its examination at the [COA] stage to a threshold inquiry into the underlying merit of the claims, and ask only if the district court's decision was debatable." Ibid.

"A claim can be debatable even though every jurist of reason might agree, after the [COA] has been granted and the case has received full consideration, that petitioner will not prevail." Ibid.

"When a court of appeals properly applies the [COA] standard and determines that a prisoner's claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious." Ibid.

What exactly does an appellant present to a court in order to meet this bar of showing that the district court's decision is debatable?

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1) Buck v. Davis, 137 S. Ct. 759,773 (2017), citing Miller-El v. Cockrell, 537 U.S. 322, 123 S. Ct. 1029, 154 L. Ed. 931 (2003)

I understand this Court wants to give the court of appeals wide discretionary power to grant or deny COAs, and to that end avoids anything too specific. However, this entirely subjective approach leaves appellants - and in this case even the courts - with a destination but no road to get there.

Appellants must show a claim is not meritless (non-debatable) that it is at some level meritorious (debatable), but without the court of appeals considering whether the appellant would ultimately succeed on those merits. So, what distinguishes between a meritless-non-debatable claim and a meritorious-debatable claim? Here this Court can provide additional guidance that would affect appellants seeking a COA nationwide. This will help keep appellants from wandering aimlessly, and help the court of appeals more consistently determine who has arrived at the intended destination.

In looking for a road between meritless and meritorious, I see a similar standard in civil litigation when a party attempts to overcome a motion for summary judgment. One court called it "the 'put up or shut up' moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of events."[2] This looks a lot like showing a district court's decision is debatable. Both standards ask, "Can a reasonable juror argue the claim before a trier of fact?"

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2) Schacht v. Wisconsin Dep't of Corr., 175 F.3d 497,504 (7th Cir. 1999); see also Cleotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986)

We need a framework with which to make the argument that a district court's decision is debatable. Usually courts express such frameworks in "prongs." For example, this Court could require an appellant to:

(1) Make a substantial showing of the denial of a constitutional right. [per 28 U.S.C. §2253(c)(2)]

(2) State facts supported by the record in defense of that claim. [thereby showing a reasonable juror has something with which to argue]

(3) Be entitled to relief IF those facts sufficently support the claim. [with no determination that they do; just that relief could be granted if they did]

Then the court of appeals can conduct a threshold inquiry into the underlying merits using these three prongs to distinguish between a meritless and meritorious claim. If an appellant meets all three, the claim is debatable and a COA is issued. If an appellant failed to make a substantial showing of the denial of a constitutional right, or made a substantial showing but failed to state supporting facts, or both made a substantial showing and stated supporting facts but would not be entitled to relief, then the court of appeals would deny to COA - **and** the court could identify where the appellant ran off the road; rather than give the all too common "COA denied" without explanation.

Finally, if an appellant believes the court of appeals wrongfully denied a COA, he can present clear and convincing evidence to this Court that he has met all three prongs to obtain a COA.

I do not expect this Court to adopt this example, but I feel something from this Court along this line would help.

III. The Supreme Court should exercise its supervisory power and determine if the Fifth Circuit erred by denying a certificate of appealability (COA) when I have shown clear and convincing evidence with which a reasonable juror can argue the district court's decision is debatable.

Having shown in reason I & II how inconsistent the lower courts can be in denying a COA, I ask this Court to review the following claims.

The facts I present for each claim are not meant to show that I should be granted relief; rather they are only meant to demonstrate what a reasonable juror could use in arguing the district court's decision is debatable.

1. Did my conviction violate my right against double jeopardy?

TEX. PENAL CODE §21.02(e) states:

> A defendant may not be convicted in the same criminal action of an offense listed under §21.02(c) when the victim is the same as an offense alleged under §21.02(b) unless the allegation is charged in the alternative, occured outside the time period alleged under §21.02(b), or is considered by the trier of fact to be a lesser included offense.

The jury convicted me of two offenses: Continuous Sexual Abuse of a Child, §21.02(b), and Sexual Performance by a Child, §43.25 - an offense listed under §21.02(c). Both offenses allege the same victim and time period. The offense under §43.25 was not charged in the alternative or as a lesser included offense.

The Texas Legislature prohibited this kind of conviction under §21.02(e). Offenses under §21.02(c), such as §43.25, are to be used in proving guilt of §21.02(b) and cannot be charged as seperate counts when the victims and time periods are the same.

2. Was I convicted on a less than unanimous verdict?

Count 1 of the jury charge lists two children seperated by the disjunctive "and/or" (CR 182-185)[3]. This Court has held that two or more victims cannot be listed under a single count using the disjunctive. see Schad v. Arizona, 501 U.S. 624 (1991); Jones v. U.S., 119 S. Ct. 2090 (1999). Using the disjunctive allowed for a less than unanimous verdict, e.g. half the jury could believe one child was a victim while the other half could believe the other child was a victim.

The likelyhood of a mixed verdict increased with the prosecution's instruction to the jury that they did not have to agree on who was a victim (8 RR 11-12)[3]. Further, trial counsel noted in his poll of the jury that several members indicated they did not believe M.P. was a victim. (While neither child testified at trial, the jury saw 1 video interview with S.T. and 2 with M.P. In the first with M.P. she does not describe any kind of abuse; and while in the second she does, it is followed by the statement that her mother told her what to say.)

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3)CR and RR refer to the Clerk's Record and Reporter's Record. I apologize to this Court, but I could not obtain a copy of either record to include in the appendix. The full record costs over $8,000 and I don't even have a couple hundred with which to pay the court fees.

3. Did my trial attorney have a valid strategy for not offering S.T.'s attendance record into evidence?

The Magistrate Judge wrote:

> [C]ounsel had a valid legal strategy for not obtaining his own copy of the attendance records. The State alleged that the offenses occured on or about a certain date; thus, the specific date was not an issue. The parents would not establish a specific date. Counsel thus concluded that the records did not have any evidentiary value under the circumstance. (App. 23a)

The magistrate judge incorrectly states that a specific date could not be established. An exact date is established twice. First, during the video interview of S.T. on May 19th, she repeatedly uses the word "yesterday" to describe the events that happened. Second, Linda Engelking testified that S.T. told her on May 19th that the acts occured "yesterday" (3 RR 214). S.T.'s attendance records show she was absent from school on May 18th.

Originally, counsel told me this evidence would be our "Perry Mason moment." Then, he relied on the prosecution to admit the records, and those records omitted May 18th. Now, counsel claims the evidence that S.T. was absent May 18th has no value because the charge uses the language "on or about."

But, counsel also states his strategy was to show that "the complaintants were not credible ... and there was a great probability that their 'memories' of the events were either false or implanted" (T.S. Affidavit #11). The attendance records support that strategy by helping to establish reasonable doubt.

Consider the other evidence on the record: S.T.'s mother, angry with me for not allowing her to attend a field trip, dreams I molested her daughter (5 RR 44); she wakes up and scolds her

daughter "until she tells the truth" (3 RR 216); she takes S.T. to a local advocacy center where a forensic interviewer and police detective question the 5-year-old for nearly 6 hours before turning on a video camera (5 RR 50-51); the interviewer admits to asking questions she "hoped would validate in the minds of each child that they were victims of abuse" (4 RR 192-194); S.T. states the acts occured "yesterday [May 18th]"; and her attendance records show she was absent May 18th.

Altogether these facts show how the attendance records have tremendous evidentiary value. It directly impacts the "probability that [S.T.'s] 'memories' of the events were either false or implanted." Therefore, counsel's failure to offer the complete record constitutes ineffective assistance.

4. Were the prosecutor's closing arguments so egregious that they rendered the trial fundamentally unfair?

This Court has held that "when the prosecutor makes a deliberate attempt to mislead, or engages in conduct sufficiently egregious that it infects a trial with unfairness, a due process violation has occured." Miller v. Pate, 386 U.S. 1 (1967).

The Fifth Circuit has outlined 4 types of proper argument a prosecutor may make during closing arguments. see Buxton v. Collins, 925 F.2d 816,825 (5th Cir.). I cite 9 different ways the prosecutor acted improperly, any one of which would be sufficient to warrant reversal. By denying a COA, the court of appeals effectively argues all 9 could not be debated, thereby sanctioning the prosecutor's conduct.

During closing arguments the prosecutor:

- Alluded to evidence that was not adduced at trial. (8 RR 48-50,56-77). U.S. v. Gallardo-Tapero, 185 F.3d 307 (5th Cir. 1999)
- Interjected her own opinion as to the veracity of the defendant (8 RR 9,48,57). U.S. v. Anchondo-Sandoval, 910 F.2d 1234 (5th Cir. 1990)
- Argued guilt based on the bad character of the defendant (8 RR 45,49-50,53,57-59). Washington v. Hofbauer, 228 F.3d 687 (6th Cir. 2000)
- Made statements presupposing defendants guilt. (8 RR 51). U.S. v. Tomblin, 46 F.3d 1369 (5th Cir. 1995)
- Interjected her own personal opinion as to the credibility of witnesses (8 RR 55,58,59). U.S. v. George, 201 F.3d 370 (5th Cir. 2000)
- Conveyed to the jury that she possesed specialized knowledge about contested factual issues (8 RR 55-56) Jackson v. State, 17 S.W.3d 664 (Tex.Crim.App. 2000)
- Drew inferences from the decision not to call witnesses available to both sides (8 RR 51-52). U.S. v. Virgen-Moreno, 265 F.3d 276 (5th Cir. 2001)
- Attempted to bolster a victim's story by stating it had not changed over time (8 RR 51). Washington, supra.
- Claimed everyone in the courtroom wanted the jury to find the defendant guilty (8 RR 45). Borjan v. State, 787 S.W. 3d 52 (Tex.Crim.App. 1990)

5. Did the changes made to the discovery agreement after I signed it violate my right to due process?

Sometime after I signed the discovery agreement, someone took a pen and hand-wrote in waivers of the notification rights under TEX. CODE CRIM. PROC. §38.072, §37.07, §38.37, and TEX. R. EVID. §404(b). (CR 29-30). I did not agree to waive these rights as can be seen by my signature on the final page. The lack of any notification had a significant impact on the defense's ability

to prepare its case. We were not notified of several extraneous matters the prosecution introduced, and therefore were not prepared to rebut them.

In response to this claim, the magistrate judge writes that I offered nothing other than conclusory allegations and bald assertions (App. 24a). I do not understand this ruling. I have cited precisely in the record, pages 29 and 30 of the Clerk's Record, where the changes were made. This is neither a conclusory allegation nor a bald assertion. It is a material fact. That a defense cannot be properly prepared when notifications are not given in compliance with the law should be self evident.

This Court has held that "under the due process clause of the 14th Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness." California v. Tombetta, 467 U.S. 479,485-486 (1984). This (criminal?) act poisoned the trial before it even began. It is impossible now to obtain the evidence the defense would have used in rebuttal. For this reason, this error should be treated as a structural error not subject to a harm analysis. The act of altering the discovery agreement violated any possible definition of "fundamental fairness."

CONCLUSION

For these reasons, a writ of certiorari should issue to review the Fifth Circuit's denial of a certificate of appealability.

Respectfully submitted,

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