

No. _____

In The
Supreme Court of the United States

WISDOM JEFFERY,

Petitioner,

vs.

NATHAN BROOKS, WARDEN,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state court's decision concerning a constitutional error, such as a claim of ineffective-assistance-of-appellate-counsel, should receive deference under AEDPA's 28 U.S.C. § 2254(d) within the context of demonstrating cause to excuse a procedural default especially where there is significant evidence of prejudice in the form of actual innocence.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, Wisdom Jeffery, Petitioner, states that there are no corporate interests involved in this case.

RELATED CASES

State of Georgia v. Wisdom Jeffery, Superior Court of Clayton County, Georgia, Judgment entered December 2012.

Wisdom Jeffery v. State of Georgia, 296 Ga. 713, 770 S.E.2d 580, Georgia Supreme Court, Judgment entered March 16, 2015.

Wisdom Jeffery v. Eric Sellers, Warden, Case No. 2016-SU-HC-16, Superior Court of Hancock County, Judgment entered February 12, 2018.

Wisdom Jeffery v. Eric Sellers, Warden, Case No. S18H0906, Georgia Supreme Court, Judgment entered November 15, 2018.

Wisdom Jeffery v. Nathan Brooks, Warden, 1:19-CV-0251-CAP, U.S. District Court for the Northern District of Georgia, Judgment entered October 17, 2019.

Wisdom v. Jeffery v. Nathan Brooks, Warden, No. 19-14347, U.S. Court of Appeals for the Eleventh Circuit, Judgment entered June 3, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, an inmate currently incarcerated at Telfair State Prison, in the State of Georgia, by and through counsel respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinions below are unpublished. The district court's opinion is also unpublished. These orders are attached as part of the Appendix.

JURISDICTION

The Eleventh Circuit entered judgment on June 3, 2020. This Court's order of March 19, 2020 extended this petition's filing date to November 2, 2020. The Court has jurisdiction under 28 U.S.C. § 1254(1).

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

United States Constitution, Amendment 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.

28 U.S.C. § 2254(d) provides:

- (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.

STATEMENT OF THE CASE

This is Wisdom Jeffery's last chance to have a court consider the substantial evidence of his innocence. Every federal court that has considered this petition has expressed "some concern" over Mr. Jeffery's innocence and the prejudice he suffered. Unfortunately, this case comes to this Court by means of a habeas corpus petition. Modern habeas corpus petitions

are governed by statute, AEDPA, that colors the lens this Court must review this case through.

In December 2012, Wisdom Jeffery was improperly convicted of the murder of his wife after a jury trial in the Superior Court of Clayton County, Georgia. The case proceeded to direct appeal, where appellate counsel was more concerned about mitigating the crime to the lesser included charge of voluntary manslaughter than investigating Mr. Jeffery's innocence. The Georgia Supreme Court affirmed his convictions but remanded to clear up some sentencing errors by the court that did not affect the ultimate sentence.

For the first time in Mr. Jeffery's state post-conviction proceeding, he was able to present evidence that he was actually innocent of the charges against him, as he was miles away from the scene when the murder occurred. The state habeas corpus court applied Georgia's procedural default rule to the claim of ineffective assistance of trial counsel and the well-known standard of *Strickland v. Washington*, 104 S.Ct. 2052 (1984) to the claim of ineffective assistance of appellate counsel. Because there was little evidence that appellate counsel had acted objectively unreasonably, the state court and the Georgia Supreme Court had little trouble denying the petition without considering the substantial evidence of Mr. Jeffery's actual innocence.

Mr. Jeffery sought relief in the U.S. District Court for the Northern District of Georgia and the matter was referred to a Magistrate Judge for an initial determination. Ultimately, the District Court applying the

stringent standards of 28 U.S.C. § 2554 denied the petition. *Williams v. Taylor*, 120 S.Ct. 1495 (2000). Both the Magistrate and District Court judge expressed concern over the prejudice prong of the *Strickland* standard as Mr. Jeffery had introduced evidence that he was miles away from the scene when the murder occurred. The District Court granted a Certificate of Appealability. The Eleventh Circuit Court of Appeals improperly gave deference to the state court's decision on the claim of ineffective assistance of appellate counsel in deciding that Petitioner could not overcome Georgia's procedural default rule. There is a split in the Circuit Courts about whether federal courts owe that deference under § 2254(d) in determining cause to excuse a procedural default.

REASONS FOR GRANTING THE WRIT

A. Federal Courts should apply a *de novo* review when evaluating constitutional error as a cause to avoid default of other claims.

There is a split in the Circuit Courts that this Court should resolve. Some circuits apply the heightened deferential standard of AEDPA's 28 U.S.C. § 2254(d) and *Williams v. Taylor* when evaluating claims of constitutional error that are used as cause to avoid a procedural default of other claims. Other circuits rightfully acknowledge that AEDPA did not apply to federal courts determination of a constitutional error to overcome a default and apply a *de novo* standard. Mr. Jeffery must acknowledge that the Eleventh

Circuit Court of Appeals found that he had not met his burden under either standard but submits that finding was erroneous.

The strongest claim in this petition is that trial counsel was ineffective for failing to investigate and call alibi witnesses. This claim is procedurally defaulted under Georgia law in that there was a change of counsel and appellate counsel failed to raise this issue at the earliest opportunity, namely, at the motion for new trial. O.C.G.A. § 9-14-48. *White v. Kelso*, 261 Ga. 32, 401 S.E.2d 733 (1991). The courts of Georgia that considered these claims relied upon the procedural default rule. Those courts also found that Petitioner had not established cause and prejudice to excuse the default even though a claim of ineffective assistance of appellate counsel had been raised and significant evidence of his actual innocence was introduced.

The Magistrate and District Court likewise declined to address the merits of that claim and found that it had been procedurally defaulted under Georgia law. In considering whether Petition had demonstrated cause to overcome the default, the District Court applied the heightened AEDPA standard.

Nothing in the plain language of AEDPA, or more specifically 28 U.S.C. § 2254, indicates that the heightened deferential standard should apply to the independent constitutional analysis of cause to excuse a procedural default under *Coleman v. Thompson*, 111 S.Ct. 2546 (1991). *Visciotti v. Martel*, 862 F.3d 749, 769

(9th Cir. 2016). Other Circuit Courts have agreed and followed that approach. *Hall v. Vasbinder*, 563 F.3d 222, 236 (6th Cir. 2009); *Fischetti v. Johnson*, 384 F.3d 140, 154 (3d Cir. 2004). At least two other circuits have applied the heightened AEDPA standard to determine cause to excuse the procedural default. *Richardson v. Lemke*, 745 F.3d 258, 273 (7th Cir. 2014); *Roberson v. Rudek*, 446 Fed. Apx. 107, 109 (10th Cir. 2011).

The First, Second, and Eleventh Circuits have not taken a position on what the proper standard would be to overcome the default. *Sealy v. Warden, Ga. Diagnostic Prison*, 954 F.3d 1338, n. 13 (11th Cir. 2020); *Janosky v. St. Amand*, 594 F.3d 39 (1st Cir. 2010); *Tavarez v. Larkin*, 814 F.3d 644 (2d Cir. 2016). The Eleventh Circuit did not decide what the proper standard was in this case. The Eleventh Circuit's analysis was wrong as it failed to consider the substantial and significant evidence of Mr. Jeffery's actual innocence to excuse the default. The problem in this case is that in not picking a standard the Circuit Court limited itself to the AEDPA mindset and failed to consider the significant amount of evidence that Petitioner was miles away when the crime occurred. "A prisoner can overcome procedural default by showing cause for the default and resulting prejudice, or by showing he is actually innocent of the offense. *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)." *Brown v. Brown*, 847 F.3d 502 (7th Cir. 2017).

Inherent in Petitioner's arguments before each post-conviction court, state and federal, was the fact

that he was actually innocent of the crimes that he was accused of committing.

Each of the federal courts that have reviewed this petition have expressed some concern that Petitioner may actually be innocent but failed to account for that evidence in their determination of cause to excuse the default. Mr. Jeffery is innocent of the crimes that he stands convicted of in the State of Georgia. The law should be a vehicle for justice. In this case in particular, where there is significant evidence introduced before the state courts that Petitioner was miles away from the crime when it occurred, federal courts should not apply the heightened AEDPA standards of § 2254(d) to determine whether cause has been demonstrated to excuse a procedural default and should consider the evidence of actual innocence. Especially where, as here, there is significant evidence that the Petitioner is innocent of the charges against him. This Court has an opportunity to resolve a longstanding circuit split and to provide this Petitioner with a chance to convince the courts below that their concerns of his innocence were well-founded.

Mr. Jeffery prays that this Court consider this petition and grant the writ of certiorari.

CONCLUSION

For all of the foregoing reasons, Mr. Jeffery respectfully requests that this Court issue a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Eleventh Circuit.

This 30th, day of October, 2020.

Respectfully submitted,

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