No.

in the
Supreme Court
of the
United States

Term,

DOUGLAS HARRIE STEWART,
Petitioner,

vs.

CATHLEEN STODDARD, WARDEN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether the rule of law espoused by *Payne v. Tennessee*, 501 U.S. 808 (1991), *Lisenba v. People of State of Californi*a, 314 U.S. 219 (1941), and *Estelle v. McGuire*, 502 U.S. 62 (1991), that the Due Process Clause of the Fourteenth Amendment provides a basis for relief where evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, qualifies as "clearly established federal law" under the Antiterrorism and Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d).

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The Petitioner, Douglas Harrie Stewart, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-titled proceeding on July 27, 2020.

OPINIONS BELOW

This case involves habeas relief under the Antiterrorism and Death Penalty Act of 1996 ("AEDPA"), and therefore Petitioner reproduces the relevant federal and state court opinions.

Federal Courts: The opinion of the Sixth Circuit Court of Appeals is reported at *Stewart v. Winn*, 967 F.3d 534 (6th Cir. 2020), and is attached hereto as **Appendix A**. The Order of the Sixth Circuit Court of Appeals granting a certificate of appealability is unpublished, and is attached as **Appendix B**. The district court's Order Approving and Adopting Report and Recommendation entered January 23, 2018 is unpublished, and is attached as **Appendix C**. The Report and Recommendation of the Magistrate, entered December 21, 2017 is unpublished, and is attached as **Appendix D**.

State Courts: The opinion of the Michigan Court of Appeals, entered September 11, 2012, is unpublished, and is attached as **Appendix E**. The order of the Michigan Supreme Court denying the application for leave is reported at 493 Mich. 952, 828 N.W.2d 52 (2013), and is attached as **Appendix F**.

JURISDICTION

The Sixth Circuit Court of Appeals' judgment was entered on July 27, 2020. This petition is timely because it is filed within

90 days of the court's judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fourteenth Amendment to the U.S. Constitution states:

> 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.

2. The Antiterrorism and Death Penalty Act of 1996 ("AEDPA") provides in relevant part:

> (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.

28 U.S.C. § 2254(d).

STATEMENT OF THE CASE

In 2011, Douglas Stewart stood trial for premeditated first-degree murder and conspiracy to commit first-degree murder following the disappearance of his wife, Venus. During that trial, the State's witness and alleged co-conspirator testified to the jury

that Mr. Stewart told him he would "go on a rampage" and "go after [the victim's] family and the lawyers and the prosecutors ***and jury***." (*Emphasis added*). This testimony deprived Mr. Stewart of due process and the fundamentally fair trial guaranteed to him under the Fourteenth Amendment.

The single issue presented by Petitioner Douglas Stewart ("Mr. Stewart") boils down to the Sixth Circuit's interpretation of "clearly established federal law" under 28 U.S.C. § 2254. That is, that "clearly established federal law" means only Supreme Court cases which involve the erroneous admission of the same type of evidence as the type of evidence challenged in the case at hand. (Appendix A, p. 5). Simply put, it is far too narrow an interpretation, as there are infinite types of evidence which could be so severely prejudicial, such that they violate the due process rights of the accused. To parse through the trove of possibly prejudicial types of evidence, mandating distinctions by subject matter, substance, speaker, and more, would be to require a Supreme Court holding for every novel factual scenario, rendering the "rule" useless to every fact pattern that does not fit the precise framework.

Instead, the better approach is that described by Justice Kennedy in *Williams v. Taylor*, 529 U.S. 362, 382 (2000), wherein

he described the beginning point as "a rule designed for the specific purpose of evaluating a myriad of factual contexts…" as well as that described by the majority, that "rules of law may be sufficiently clear for habeas purposes even when they are expressed in terms of a generalized standard rather than as a bright-line rule[.]" *Id.*

Ultimately, the Sixth Circuit held that because there is no Supreme Court case addressing a co-conspirator's irrelevant testimony alleging that the accused threatened to harm jurors, then such testimony is not sufficiently prejudicial to entitle the accused to a new trial. This "kind" of evidence is far too novel to warrant a corresponding bright-line rule.

The Sixth Circuit found that Mr. Stewart failed to cite to a Supreme Court holding "covering the type of due process error he asserts." (Appendix A, p. 5). But the cases cited by Mr. Stewart concern precisely the type of due process error at issue in his case – the admission of unduly prejudicial evidence that deprived him of due process. What's more, the cases cited by Mr. Stewart concern the same category of evidence at issue in his case: evidence of the accused's prior conduct as a means to prove conformity therewith. For instance, in *Lisenba*, the state sought to submit live rattlesnakes used on the defendant's deceased wife (a failed

murder attempt) before he ultimately drowned her. *Lisenba v. People of State of Californi*a, 314 U.S. 219, 224 (1941). The introduction of the failed murder attempt was not only inflammatory, but also served to demonstrate prior bad conduct of the accused. In *Estelle*, the prosecution introduced evidence of the child's prior injuries, to establish the defendant's intent in causing the child's death. *Estelle v. McGuire*, 502 U.S. 62 (1991). In other words, because the child had been previously abused, it must have been the defendant who abused her, and it must have also been the defendant who killed her. *Id.*, 502 U.S. at 480. The evidence at issue in *Lisenba* and *Estelle* falls into a larger category of evidence, which is evidence demonstrating prior conduct of the accused, to prove that the accused acted in conformity therewith in committing the crime for which he was then tried. The saving grace for the proponents of the pieces of evidence presented in *Estelle* and *Lisenba* was that no matter how inflammatory the evidence, it was, indeed, relevant. Here, the evidence is not relevant.

In Mr. Stewart's case, the co-conspirator's testimony is of the same category. Testimony that Mr. Stewart said he would "go after" his wife, the jury, and the attorneys, was offered to show that if Mr. Stewart would "go after" and harm these people in the

context of a case involving the well-being of his children, surely, he would also kill Venus Stewart. It was intended to show his propensity to cause harm, no matter how irrelevant and attenuated the statement was.

The Sixth Circuit went to great lengths to distinguish the cases relied upon by Mr. Stewart, finding that the rule was too broad to apply to the "type" of evidence at issue in Mr. Stewart's case. It concluded that in the cases relied upon by Mr. Stewart, the evidence at issue was not of the same "type" of evidence as the testimony Mr. Stewart challenges. (Appendix A, p. 5). And while the *Estelle* Court reiterated its previous admonition that the Supreme Court has "defined the category of infractions that violate 'fundamental fairness' very narrowly," *Dowling v. United States,* 493 U.S. 342, 352 (1990), that category patently includes severely prejudicial and inflammatory evidence that affects the accused's due process rights.

In this case, Petitioner argued, and Judge Stranch agreed, that notwithstanding the outcome of *Estelle*, *Lisenba*, or *Payne*, their holdings nevertheless remain a rule of law – and accordingly, that rule applies to Mr. Stewart's case. (Appendix A, p. 5). In so applying, it is clear that unlike the *relevant* evidence that fell short of being the sort of severely prejudicial evidence that warranted a

mistrial, this *irrelevant* evidence was so severely prejudicial, such that the denial of Mr. Stewart's motion for a mistrial was in contravention of clearly established federal law, and warranted a new trial.

A. Proceedings in the State Trial Court

The underlying case involves Mr. Stewart's conviction for premeditated first-degree murder and conspiracy to commit first-degree murder following the disappearance of his wife, Venus. (Appendix B, p. 5). The State's theory of the case involved a conspiracy between Mr. Stewart and Ricky Spencer, a man whom Mr. Stewart met over the popular gaming system, Xbox Live. (*Id.*) According to the State, Spencer served as Mr. Stewart's alibi, posing as Stewart in Virginia, while Stewart traveled from Virginia to Michigan to kill Venus. (*Id.*) Authorities failed to locate Venus's body. (*Id.*)

Prior to Venus's disappearance, the Stewarts' marriage was volatile. Mr. Stewart had expressed his concern that Venus was harming the children. (Appendix B, p. 5). During trial, the State elicited certain hearsay testimony, clearly constituting impermissible character and prior "bad act" evidence about the involvement of protective services with the children:

> Q. What was really important that he had to tell you?

> A. He was telling me like, "I talked to my dad already about this and, you know, my wife is physically and mentally hurting my kids. And, you know, if I wasn't—like if I wasn't a hundred-percent sure that my kids were going to be injured or, you know, killed by my wife, and if I don't do anything and I find out one day that they're injured or, you know, or dead, that I would go on a rampage."
> And it wouldn't be like a rampage like meaning like killing people, and it wouldn't be a, you know, just an instant thing. He'd plan it out and go after her family and the lawyers and prosecutors and jury until like they stopped and figured out what – what was going on.

(Appendix A, p. 3). Shortly after, Mr. Stewart's trial counsel moved for a mistrial, which was denied. The trial court noted that it interpreted the statement to mean "that if something were to happen to his children by his wife that he would then go on a rampage against the prosecutor and the jury that dealt with that issue, not in this case." (*Id.*).

Mr. Stewart was ultimately convicted on both counts and sentenced to concurrent terms of life in prison. (*Id.*)

B. Proceedings in the State Appellate Courts

Mr. Stewart appealed by right to the Michigan Court of Appeals, which affirmed, and then the Michigan Supreme Court, which declined to hear his case. (Appendix E, p. 1; Appendix F, p. 1).

C. Proceedings in the District Court

Having exhausted his state court remedies, Mr. Stewart filed a habeas petition to the Western District of Michigan, arguing he was: (1) denied due process when an FBI examiner gave unqualified expert testimony; (2) denied a fair trial by the denial of his motion to disqualify the trial judge; (3) denied a fair trial by the denial of his motion for a mistrial; (4) denied due process when the prosecutor vouched for the lead investigator's credibility; and (5) denied due process when the trial court supplemented the standard jury instructions for first-degree murder. (Appendix D, pp. 1-2). The magistrate judge recommended that Mr. Stewart's petition be denied on the merits, and that his certificate of appealability also be denied. (Appendix D, p. 37). The district court adopted the Report and Recommendation, denying his petition, and declining to issue a COA. (Appendix C, p. 3).

D. Proceedings on Appeal

Mr. Stewart appealed the denial of his petition to the Sixth Circuit Court of Appeals, which issued a COA on the third issue: that he was denied a fair trial when the trial court overruled his motion for a mistrial. (Appendix B, p. 5).

In a 2-1 Decision, the Sixth Circuit denied Mr. Stewart's appeal. (Appendix A, p. 1). Specifically, it found that the cases relied upon by Mr. Stewart did not constitute "clearly established

federal law" under 28 U.S.C. § 2254. (Appendix A, pp. 5-6). Judge Stranch disagreed, and authored a dissent wherein she reasoned that the rule found in the holdings of *Payne v. Tennessee*, 501 U.S. 808 (1991), *Lisenba v. People of State of California*, 314 U.S. 2918 (1941), and *Estelle v. McGuire*, 502 U.S. 62 (1991), provided a basis for relief to Mr. Stewart. (Appendix A, pp. 11-12). She concluded that Mr. Stewart was, therefore, entitled to a new trial. (Appendix A, p. 14).

REASONS FOR GRANTING THE WRIT

A. The Rule of Law Set Forth in *Lisenba* and *Estelle* is Sufficiently Broad to Apply to a Larger Category of Evidence.

The Sixth Circuit's decision runs contrary to other circuits in its determination as to what constitutes "clearly established federal law" for purposes of a habeas petition. The Sixth Circuit declined Mr. Stewart's petition on the basis that he "frame[d] the issue 'at too high a level of generality'" to constitute "clearly established federal law." (Appendix A, p. 5). But in her Dissent, Judge Stranch recognized that it is equally true that "rules of law may be sufficiently clear for habeas purposes even when they are expressed in terms of a generalized standard rather than as a bright-line rule[.]" (Appendix A, p. 11). One such rule, she concluded, is the very rule that Mr. Stewart cited in his briefing: when "evidence is introduced that is so unduly prejudicial that it

renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." (Appendix A, p. 11).

"[R]ules of law may be sufficiently clear for habeas purposes even when they are expressed in terms of a generalized standard rather than as a bright-line rule." *See Williams v. Taylor*, 529 U.S. 362, 382, (2000), quoting *Teague v. Lane,* 489 U.S. 288, 311–319, (1989). Quoting Justice Kennedy's concurring opinion in *Wright v. West,* 505 U.S. 277, 308 (1992), the Supreme Court noted:

> If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule.... Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.

Williams, 529 U.S. at 382. Thus, the Court's focus ought to be on the rule of law – not the factual differences. Finally, "errors that undermine confidence in the fundamental fairness of the state adjudication certainly justify the issuance of the federal writ." *Id.*, *citing Teague,* 489 U.S. at 311–314.

Indeed, the Supreme Court cases cited by Mr. Stewart in his appeal, such as *Lisenba* and *Estelle*, hold true to the same rule: where the trial court commits an evidentiary error that is so

unduly prejudicial, such that it renders a trial fundamentally unfair, the Fourteenth Amendment provides relief. However, the Sixth Circuit reasoned that because the evidence ultimately introduced in those cases was ***not*** so prejudicial, and did ***not*** render the trial fundamentally unfair, neither *Lisenba* nor *Estelle* could serve as authority for the rule of law which Mr. Stewart relied upon. Not so. The rule articulated in each case operates as just that: a rule. Whether the particular piece of evidence, either the killer snakes of *Lisenba*, or the prior abuse testimony of *Estelle*, met the threshold for fundamentally unfair prejudicial evidence is inapposite to the fact that the rule of law remains clear: where severely prejudicial evidence renders a trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a remedy. It nevertheless serves the same purpose: clearly established federal law, which may be relied upon for its rule for purposes of AEDPA.

Critically, a sampling of other circuit cases establishes that the Supreme Court cases relied upon by Mr. Stewart have been relied upon for the very proposition of law that Mr. Stewart advances – and as "clearly established federal law."

The Fourth Circuit, in *George v. Angelone*, 100 F.3d 353, 362 (4th Cir. 1996), relying upon the rule of law in *Estelle,* held

that evidence of injuries to the victim's genitals, and testimony from a witness that the defendant confessed to using a stun gun to the victim's genitals "was properly admitted during the guilt phase of the trial" such that it could not find "that it so tainted the proceedings with unfairness" to violate George's due process. *Id.* at 362. Critical to this case, the Fourth Circuit applied the holding of *Estelle* to the introduction of inflammatory testimony regarding George's conduct toward the victim. In other words, the Fourth Circuit applied *Estelle* to the ***category*** of evidentiary error: the admission of inflammatory testimony that demonstrated other conduct of the defendant to establish conformity therewith (*i.e.*, causing injuries to the victim before ultimately killing him). Despite that this evidence clearly did not demonstrate the defendant's prior abuse of the victim (as "prior abuse testimony" is contemplated in *Estelle*), it was nevertheless of the same category of evidence. That is the appropriate application of *Estelle* to Mr. Stewart's case.

Similarly, in *Wood v. Quarterman*, 503 F.3d 408, 414 (5th Cir. 2007) (another AEDPA case), the Fifth Circuit relied upon *Payne* for the proposition that evidentiary errors may violate the Fourteenth Amendment:

> According to the Supreme Court, the admission of evidence may violate the Due Process Clause of the

> Fourteenth Amendment if the evidence is "so unduly prejudicial that it renders the trial fundamentally unfair." *Payne v. Tennessee,* 501 U.S. 808, 825, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) (citing *Darden v. Wainwright,* 477 U.S. 168, 179–83, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986)).

Similar to the Fourth Circuit in *George*, it considered the at-issue evidence, evidence of the defendant's prior conduct, under the *Payne-Darden* framework. According to the Fifth Circuit in *Wood*, *Payne* held that introduction of prejudicial evidence may violate the Due Process Clause – despite that the type of evidence at issue in *Payne* was specifically "victim impact evidence" and in *Wood*, the evidence at issue was testimony of another witness claiming to have been raped by the appellant. To the *Wood* Court, it was enough that the evidence before the court was assertedly "so unduly prejudicial" that it rendered the appellant's trial fundamentally unfair, such that the *Payne* rule applied for purposes of AEDPA.

The *Wood* Court went on to note:

> This court has stated that "[a]n extraneous offense may be admitted into evidence without violating the due process clause if the government makes a 'strong showing that the defendant committed the offense' and if the extraneous offense is 'rationally connected with the offense charged.'" *Story v. Collins,* 920 F.2d 1247, 1254 (5th Cir.1991) (quoting *Enriquez v. Procunier,* 752 F.2d 111, 115 (5th Cir.1984)).

Categorically, the evidence in *Wood* was "evidence of an extraneous offense" – and was introduced, and tended to show, that because

the appellant allegedly raped the witness, he must have also killed the victim. Interestingly, just as the *Wood* Court relied upon the holding of *Payne*, the *Payne* Court based the holding in part on the *Darden* decision – which involved improper statements by the prosecutor. In sum, the rule of law – that severely inflammatory and prejudicial evidence may violate due process – remains true, despite that the specific subject matter of the evidence in each case differs.

The Ninth Circuit has also relied upon *Estelle* for the same rule of law, but in so doing, also clarified that Estelle does not create a "presumption" of a constitutional violation. Specifically, the Ninth Circuit has reiterated the *Estelle* Court's conclusion that **"we need not explore further the apparent assumption of the Court of Appeals that it is a violation of the due process guaranteed by the Fourteenth Amendment for evidence that is not relevant to be received in a criminal trial."** *James v. Soto*, 723 F. App'x 451, 453 (9th Cir. 2018), *cert. denied sub nom. James v. Asuncion*, 139 S. Ct. 939, 203 L. Ed. 2d 133 (2019). The clarification, highlighting the fact that *Estelle* makes no rule of law as to irrelevant evidence, is inapposite to Mr. Stewart's case, and does not change the analysis.

This clarification simply means that *Estelle* does not create a presumption that irrelevant evidence violates due process – and

that is not at all what Mr. Stewart asserts. Rather, the analysis remains whether testimony that Mr. Stewart would "go on a rampage" and "go after jurors" was severely inflammatory evidence, and whether it so infected the trial with prejudice, thereby denying Mr. Stewart due process afforded under the Fourteenth Amendment. But the analysis requires no presumption. Rather, the Court's analysis requires a determination of whether the evidence at issue was "unduly prejudicial" which, in turn, demands that the Court weigh the probative value of a piece of evidence against its prejudicial impact. Where, as here, the probative value is nil, the evidence is unduly prejudicial.

So while the Ninth Circuit noted that pursuant to the *Estelle* Court "the category of infractions that violate 'fundamental fairness' is a very narrow one," it also concluded the category of infraction to definitively include state evidentiary errors which rise to constitutional dimensions. *Id.*, 723 F. App'x at 453 quoting *Payne*, 501 U.S. at 825. To that end, the Ninth Circuit has also found that "evidence erroneously admitted warrants habeas relief only when it results in the denial of a fundamentally fair trial in violation of the right to due process[,]" *Briceno v. Scribner*, 555 F.3d 1069, 1077 (9th Cir. 2009), quoting *Estelle*, 502 U.S. at 67-68.

In *Soto*, the Ninth Circuit reasoned that in *Payne,* "the [Supreme] Court observed that the due process clause bars the admission of evidence 'so unduly prejudicial that it renders the trial fundamentally unfair,'" but determined that the petitioner did not argue that the California Court of Appeals unreasonably applied that precedent. *Soto*, 723 F. App'x at 453 quoting *Payne v. Tennessee*, 501 U.S. at 825. Implicit in this decision, are two conclusions: first, that *Payne* constitutes clearly established federal law for purposes of the factual framework presented in *Soto*, and second, that this "precedent" can apply to the admission of severely prejudicial evidence – evidence ***other than*** victim impact statement evidence, as was the case in *Payne*. *See also Perrault v. Duncan,* 211 F.3d 1274 (9th Cir. 2000) ("Instead, the admission of improper evidence only violates due process if it renders the trial fundamentally unfair." (Citations omitted)).

The Eleventh Circuit has followed suit, relying on *Lisenba* and *Estelle* for the same proposition of law in *Taylor v. Sec'y, Fla. Dep't of Corr.*, 760 F.3d 1284, 1295 (11th Cir. 2014), another post AEDPA case, finding:

> Habeas relief is warranted only when the error **"so infused the trial with unfairness as to deny due process of law."** *Lisenba,* 314 U.S. at 228, 62 S.Ct. 280; *see Estelle,* 502 U.S. at 75, 112 S.Ct. 475 (holding that habeas relief was not warranted because neither the introduction of the challenged

> evidence, nor the jury instruction as to its use, "so infused the trial with unfairness as to deny due process of law"); *Bryson v. Alabama,* 634 F.2d 862, 864–65 (5th Cir. Unit B Jan.1981) ("A violation of state evidentiary rules will not in and of itself invoke Section 2254 habeas corpus relief. The violation must be of such a magnitude as to constitute a denial of 'fundamental fairness.'")[.]

While it concluded that "[t]he trial court's exclusion of the victim's sisters' proffered testimony [did] not come close to denying Taylor fundamental fairness[,]" the Eleventh Circuit nevertheless based its decision on the rule of law presented in ***both*** *Estelle* and *Lisenba*, despite that the type of evidence challenged in *Taylor* was not the same "type" of evidence challenged in either case. *Id.*, 760 F.3d at 1295. *See also, Felker v. Turpin*, 83 F.3d 1303, 1311–12 (11th Cir. 1996).

Given that a number of circuits have pointed to *Estelle*, *Lisenba*, and *Payne* as "clearly established federal law" for different types of evidence that fell within the same broad category of challenged evidence, these cases most certainly constitute "clearly established federal law" for purposes of AEDPA. Accordingly, the Supreme Court should grant Mr. Stewart's Petition for Certiorari to answer the question of whether *Lisenba*, *Estelle*, *Payne* and other Supreme Court holdings apply to the broader category of severely prejudicial evidence, or else whether

they exclusively apply to evidence of the same subject matter as the Sixth Circuit's decision suggests.

B. The Sixth Circuit Erroneously Found the Evidence Challenged by Mr. Stewart Categorically Differed Such That No Clearly Established Federal Law Applied.

The St. Joseph County trial court overruled Mr. Stewart's motion for a new trial in contravention of the Supreme Court's decisions in *Lisenba*, and *Estelle*,[1] despite that the testimony at issue was severely prejudicial, irrelevant and served only to inflame the jury, ultimately depriving Mr. Stewart of due process.

"As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice*." Lisenba,* 314 U.S. at 236. Due process is denied where the "absence of that fairness fatally infected the trial[.]" *Id. See also*, *Estelle,* 502 U.S. at 75 (severely prejudicial evidentiary errors may violate due process). Critically, the Supreme Court has expressly established that due process is violated if the admission

[1] Mr. Stewart also relies upon *United States v. Berger*, where the Supreme Court's robust jurisprudence on the concept of fundamental fairness began to develop. *United States v. Berger*, 295 U.S. 78 (1935). Under *Berger,* where the "prejudice to the cause of the accused is so highly probable that we are not justified in assuming its nonexistence," and where "the probable cumulative effect upon the jury which cannot be disregarded as inconsequential," it is clear that "[a] new trial must be awarded." *Berger,* 295 U.S. at 89.

of certain evidence is so unduly prejudicial that the trial is rendered fundamentally unfair. *Payne,* 501 U.S. at 827. Where the State introduces prejudicial evidence such that it "so infused the trial with unfairness as to deny due process of law," habeas relief is warranted. *Estelle, supra*, quoting, *Lisenba supra.*

Put simply, the rule of law found in *Lisenba* and *Estelle* applies to the introduction of severely prejudicial evidence – especially where the evidence implicates a constitutional right – here, the guarantee to the accused of a fundamentally fair trial, and the due process protections afforded under the Fourteenth Amendment.

Where this case diverges factually from *Estelle* and *Lisenba* is that the evidence introduced was irrelevant. As Judge Stranch noted, while testimony about Stewart's comment that he would kill Venus if something were to happen to their children may be probative, testimony that he would "go on a rampage" and "go after her family and the lawyers and prosecutors and jury" was not. (Appendix A, pp. 13-14).

To be clear, the fact that the testimony was irrelevant does not affect the rule of law applied, but rather tips the scales in favor of a finding that the testimony was "unduly" prejudicial. Whether evidence is "unduly prejudicial" necessarily involves the balancing

of its probative and prejudicial effects. If it is prejudicial, but not probative, it is likely to be "unduly" prejudicial and unacceptable under the Due Process Clause.

Even if the Court were to accept the State's theory, that the "rampage" testimony is relevant, it simultaneously belies the State's and the trial court's contrary conclusion that the jury could not have felt threatened. The trial court's distinction is that the testimony only relates to jurors that "dealt with that issue," *i.e.*, Venus's abuse of the children, not the jurors "in this case." In other words, the trial court concluded Stewart would "go after" some ***hypothetical*** jury, not this ***specific*** jury, thus the testimony couldn't be prejudicial. This distinction defies common sense – the underlying message is that Mr. Stewart will become irrationally dangerous toward innocent people who did no wrong. And thus if he were to "go after" the hypothetical jury, what's to stop him from going after that sitting jury that is passing judgment on the remainder of his life.

In this case, the "prejudice to the cause of the accused is so highly probable that we are not justified in assuming its nonexistence." *United States v. Berger*, 295 U.S. 78, 89 (1935). Spencer's inflammatory testimony deprived Mr. Stewart of the fundamental fairness essential to the very concept of justice.

Lisenba, 314 U.S. at 236. The error violated Mr. Stewart's right to due process and a fundamentally fair trial as guaranteed under the Fourteenth Amendment. Mr. Stewart is entitled to habeas relief.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED this 22nd day of October, 2020.

Respectfully submitted,

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