

NO.

20-7147

IN THE

United States Supreme Court
on petition for a writ of certiorari from final judgment
of the Fifth Circuit Court of Appeals (No. 20-40121)

JOE ANGEL ACOSTA III - Petitioner

VI

Lene Davis - Respondent

ORIGINAL

Petition for writ of Certiorari

Supreme Court, U.S.
FILED

NOV - 5 2020

OFFICE OF THE CLERK

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Petitioner Pro se

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Questions Presented

Issue 1: Does this Court's holding in Cole v. Arkansas 68 Sct 514
constitute "Actual Innocence" or "Miscarriage of Justice" to excuse
procedural default?

NO. _____

(3)

List of Parties

All Parties appear in the caption of the case on the cover page.

TABLE OF Contents

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*Each Document in ALPhAbEtIcAl order - marked at upper RIGHT hand corner, with their page numbers located at bottom of page,

Cover / Questions Presented	A
List of Parties	B
Table of Contents / Index to Appendices	C
Table of Authorities Cited	D
Opinions Below	E
Jurisdiction	F
Constitutional and statutory Provisions Involved	G
Statement of the Case	H
Reasons For Granting the writ	I
Conclusion	J
Proof of Service	K

Index to Appendices

~~Petitioner~~ is unable to provide the Court with copies of decisions. I am indigent and can not purchase copies. ON 9-21-20 I mailed a package of my personal records to: MR. Ron Rich - Oblation Paper & Press - 516 - N.W 12th Ave. - Portland, Oregon 97209 (503) 223-1093 - for copies to attach to this Petition. MR. Rich has not responded.

Petitioner asks the Court to excuse his indigency and the Prisons Policy of not making copies and proceed with records on file in respective Courts.

*Pursuant to 28 USC § 1746, I attest under Penalty of Perjury the above is true and correct.

Paul R. Smith
Petitioner Pro se

 Table of Authorities

- ① Cole v. Arkansas _____ ① Pg. 1, 2, 3, 4.
- ② Texas Penal Code § 22.02(a)(1) _____ ① Pg. 1, 4.
- ③ Texas Penal Code § 22.02(a)(2) _____ ② Pg. 1.
- ④ Romero v. State 331 SW3d 82 _____ ② Pg. 1.
- ⑤ TYRA v. State 897 SW2d 796 _____ ① Pg. 2.
- ⑥ Wooley v. State 273 SW3d 260 _____ ① Pg. 2.
- ⑦ Strickland v. Washington 466 US at 688 _____ ② Pg. 3.
- ⑧ Hill v. Johnson 210 F3d 481 _____ ① Pg. 4.
- ⑨ Sawyer v. Whitely 112 Sct 2514 _____ ② Pg. 4.
- ⑩ McGivgins v. Perkins 133 Sct 1924 _____ ② Pg. 4.

IN THE
Supreme Court of the United States
PETITION FOR WRIT OF CERTIORARI

The petitioner respectfully prays that this honorable Court issue a writ of certiorari to review the judgement below;

OPINIONS BELOW

NO opinion was ever issued by the United States District Court or 5th Circuit Court of Appeals in this case. It never reached that stage and was dismissed on procedural grounds.

Relative to my questions are the following:

- ① Judgement of the 13th Court of Appeals of Nueces County, Texas for Acosta v. State, NO. 13-13-00170-CR (unpublished)
- ② Refusal of Petition for Discretionary review of Acosta v. State, NO. PD-1323-14, by Texas Court of Criminal Appeals in Austin, TX. (unpublished)
- ③ memorandum and Recommendation (DE-27) for Acosta v. Davis NO. 2:16-CV-00149, in United States District Court/Southern District of TX.
- ④ Dismissal of Acosta v. Davis, NO. 2:16-CV-00149 (DE-48) in the US District Court/Southern District of Texas, (unpublished)
- ⑤ memorandum and Recommendation (DE-37) for Acosta v. Davis NO. 2:19-CV-00008, in the U.S. District Court/Southern District of Texas (unpublished)
- ⑥ Order denying C.O.A for Acosta v. Davis, NO. 20-40121, in the 5th Circuit Court of Appeals (document# 00515515816) - (unpublished).

Jurisdiction

The date on which the United States Court of Appeals decided my case was AUGUST 5, 2020.

NO Petition for rehearing was timely filed in my case.

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

Constitutional and Statutory Provisions Involved

- ① Due Process Clause of the 5th 14th Amendment of the US Constitution.
 - ② Right to Notice under the 6th Amendment of the US Constitution.
 - ③ Right to jury trial under the 6th Amendment of the US Constitution.
 - ④ TX. Penal Code § 22.02(a)(2) - aggravated assault by use of deadly weapon.
 - ⑤ TX. Penal Code § 22.02(a)(1) - aggravated assault when death or serious bodily injury occurs.
-

Statement of the Case

ON 2-16-12 I was indicted for aggravated assault with a deadly weapon in Cause NO. 12-CR-0277-A, in the 28th District Court of Nueces County TX, (Acosta v. State).

The indictment alleged I "intentionally, knowingly, or recklessly caused bodily injury to David Dee by cutting the said David Dee with a knife on the face, and the defendant did then and there use or exhibit a deadly weapon, to wit: a knife".

My first trial ended in a hung jury on 2-12-13. However, there was a signed verdict form of not guilty I was never told about until my second trial, only me and the alleged victim were present.

My second trial ended with a 60 Year sentence on 3-5-13. This trial had five witnesses for the state that were not present at the first trial and victim Dee. I was denied any witnesses.

ON 7-30-13 appellate Counsel filed my brief with the 13th Court of Appeals in Corpus Christi TX, (Acosta v. State NO. 13-13-00170-CR) raising 4 issues (sufficiency of the evidence, sufficiency of the enhancements, failure to instruct the jury of the lesser included offense, ineffective assistance of Counsel).

ON September 4th, 2013 the 13th court of appeals denied all relief and affirmed my conviction.

I then petitioned the Texas Court of Criminal Appeals for Discretionary Review (P.D.R.) on 12-5-14, (PD-1323-14). I supplemented the P.D.R. on 1-26-15. I raised 4 grounds: (The appellate court used the wrong analysis to determine the evidence sufficient, the appellate court's decision conflicts with precedent, the appellate court failed to apply the second prong of the Rosseau Test, the appellate court erred in finding Counsel effective). The TCCA refused my petition without opinion.

I then discovered the trial record was incomplete after a friend bought me a copy. I filed a petition with the Judicial Branch Certification Commission (Cause NO. CSR-15-09129-063) on 5-28-15. It was dismissed for jurisdiction 7-27-15. I filed for rehearing 8-3-15, which was also dismissed 11-25-15.

during pendency of the JBCC petition, I filed my first State Habeas Corpus (Ex Parte Acosta WR-84-206-02) on 11-20-15. The Texas Court of Criminal Appeals dismissed it as non-compliant under T.R.A.P 73.2, on 12-9-15.

ON 12-10-15 I filed a motion for new trial in the trial court based on an incomplete trial record. The court ignored it and never ruled on it.

I then sought mandamus to compel the trial court to rule on my motion for new trial in the 13th court of appeals in Corpus Christi, TX on 4-1-16 (NO. 13-16-00170-CR). It was denied 4-4-16. And my motion for rehearing was denied 5-10-16.

With the AEDPA time limit due - I filed my first federal 2254 Petition Challenging this case (Acosta v. Davis 2116-CV-00149) in the Corpus Christi, TX federal court on 5-3-16.

Prior to the Federal Petition I had filed my second State Habeas Corpus (EX Parte Acosta WR-84-206-05) on 2-12-16. The TX. Court of Criminal Appeals dismissed it as non-Compliant on 5-4-16, which I contest to this day.

While my Federal Petition was Pending I was given a temporary stay to exhaust. The prison lawyers (state counsel for offenders) told me they would refile my state writ and extend the stay. This never occurred and the magistrate did not allow me to amend or determine which issues were exhausted, nor was a miscarriage of justice found.

The magistrate dismissed it as a mixed Petition Granting Respondents motion for summary judgment that urged the Court to dismiss "because those claims would be best resolved upon review of additional records that may be developed through Acostas remaining avenue of state habeas proceedings." This was on 11-30-16.

Before final Judgment I filed my 3rd State Habeas Corpus (EX Parte Acosta WR-84-206-06) on 12-6-16, which was dismissed under the 2 forum Rule by the Texas Court of Criminal Appeals on 4-5-17.

The federal Court refused to Grant my motions for stay to exhaust in state court. ON 1-31-18 final Judgment was entered adopting the magistrates recommendation.

I finally filed my 4th State Habeas Corpus on 2-26-18 (EX Parte Acosta WR-84,206-07) - which was denied 10-31-18 by the Texas Court of Criminal Appeals in Austin, TX.

I then returned to Federal Court with my Amended 2254. (Acosta v. Davis 2:19-cv-00008). This petition was simply labeled a new Petition without regard to the basis of respondents Motion for Summary Judgment cited above.

The Magistrate dismissed it as time barred on 7-25-19. on 1-13-20 the District Court adopted the magistrates recommendations and refused to address my objections, which it deemed frivolous / repetition.

I then sought relief in the 5th Circuit Court of Appeals, seeking C.O.A. on the following: ① whether the district court erred in dismissing my petition as untimely ② was my petition an amendment under Mayle v. Felix 125 sct 2562 ③ was the courts dismissal an unconstitutional suspension of the writ ④ was petitioner affirmatively misled by the court, for equitable tolling ⑤ does my SBCC Petition qualify for statutory tolling ⑥ does actual innocence overcome statute of limitations.

ON 8-5-20 the fifth circuit denied C.O.A for failure to show a denial of a constitutional right.

The Prison held my mail (final Judgment) until 8-17-20, preventing me from timely seeking rehearing.

Reasons for Granting the Petition

Issue #1:

The 5th Circuit Court of appeals erred by denying me a C.G.A. because I did make a Substantial Showing of the denial of a Constitutional right, and that Jurists of reason would debate whether the district court was correct in its procedural ruling.

Constitutional RIGHT I was denied was Due Process. And the Procedural ruling is debatable because it is supported by law and was never addressed by any court to date.

Petitioner Cites this Courts holding in *Cole v. Arkansas* 68 Sct 514, where it states "no principle of procedural due process is more clearly established than that of Notice of the specific Charge and a chance to be heard in a trial of the issues raised by that Charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. 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 tried, as it would be to convict him upon a charge that was never made."...

Petitioner is serving a 60 Year sentence for a crime he never was charged with by indictment. There are 2 ways to commit aggravated assault in the state of Texas: ① by causing serious bodily injury; ② by use of a deadly weapon. The State designates each by statute: Texas Penal Code § 22.02(a)(1) and 22.02(a)(2).

Here, Petitioner was indicted and tried for 22.02(a)(2) - where use of a deadly weapon occurs. Petitioner's indictment never alleged serious bodily injury. The indictment alleges only bodily injury, which does not make an assault aggravated.

The indictment further alleged a knife was used. However, Texas law states a knife is not a deadly weapon per se - it has to be proven so through manner of use, because it was not exhibited here.

Therefore, under Texas law, a deadly weapon analysis is conducted on sufficiency review. This analysis has several factors that must be satisfied to find deadliness, (see *Romero v. State* 331 SW3d 82).

Here, the appellate court affirmed my conviction on grounds never alleged in the indictment or submitted to the jury. The appellate court affirmed under 22.02(a)(1) - where serious bodily injury results, (see 13th Court of Appeals judgement for *Acosta v. State*, No. 13-13-00170-CR, Page 5; last sentence - "Here, a person commits aggravated assault

with a deadly weapon when the person causes serious bodily injury to another while using or exhibiting a deadly weapon.".

This is significant to my claim because under Texas law, serious bodily injury negates the need for a deadly weapon analysis, because it makes any weapon deadly, (see *Tyra v. State* 897 S.W.2d 796 - "an object is a deadly weapon if the injuries produced result in death or serious bodily injury.")

In *Cole v. Arkansas*, the defendants were charged with violating section 2 of an Arkansas statute but the Arkansas Supreme Court affirmed on the basis that the defendants committed the separate, distinct, and substantially different offense defined in section 1 of the Arkansas statute.

This is identical to what happened here. Texas courts are well aware of this well established law. (see *wooley v. State* 273 S.W.2d 260 - "due process prevents appellate courts from affirming a conviction, based upon legal and factual grounds that were not submitted to the jury.")

The appellate court further alleged Detective Almendariz "responded to the 911 call and saw an amount of blood that night," (judgment, page 7). Detective Almendariz never said that. He never responded to the 911 call. He testified to investigating the case days later. (see reporters Record at page 14-23, volume 4).

Here, no one ever saw a knife. No one disputes Dee was cut. What was in dispute was where Dee was cut. His claim was he was cut outside the house in his truck as he was leaving. My claim was I never had a knife or any weapon when I attacked Dee inside my house. Dee's wound could have been caused by anything in the house where we fought.

Dee never testified to seeing a knife, (see reporters record volume 3, page 20-37). And witness Moreno testified to seeing no weapon at all. (see reporters record volume 4, page 27-30). Her testimony was seeing only a hand. (see reporters record volume 4, page 30, line 13). The state realized this and then led her by saying "do you remember discussing that you remember seeing the knife?" (see reporters Record volume 4 page 31). The testimony she gave concerned a knife I used at work - not what was used to cut Dee. She described it as "a little blade - pocket knife" (reporters record volume 4, page 31, line 1-11).

Therefore, in the context of the appellate courts denied deadly weapon analysis - the evidence would be insufficient, and the court would have to acquit.

Appellate counsel failed to move for rehearing on this error. I argued in Ground One of my Petition for Discretionary Review in the TCCA (13-13-00170-CR-A) that "I was not charged with causing serious bodily injury." (page 2 of PDR), and I said Detective Almendariz did not respond to the 911 call (page 3 of PDR).

Petitioner argues that the sentence "I was not charged with causing serious bodily injury." Fairly, alerted the court to a violation of *Cole v. Arkansas*, as I've pointed out the TCCA recognized in *wooley v. State*. My Supplement to the PDR raises my Constitutional right to due process, (see page 3 last paragraph for example). Indeed, Respondent never said this claim was unexhausted.

In my first federal Petition (Acosta v. Davis 2:16-cv-00149) - I raised this Ground in Ground one, And in Ground nine(a), as an ineffective Assistance of Counsel Claim.

Respondent labeled Ground one as a "sufficiency" Ground, (see DE-24, Page 1), Respondent further stated it was exhausted, (DE-24, Page 8), Respondent further said it was properly presented to the Texas Court of Criminal Appeals, (see DE-24, 9).

I filed a response (DE-25) seeking a Rhines stay. Alternatively I stated "should the Court deny my Rhines stay motion and force me to proceed on the grounds that are exhausted," (see last paragraph of page 1).

The magistrate said I "failed to show that failure to consider any of the claims pleaded constitutes a fundamental miscarriage of justice," (see DE-27, page 15).

Nowhere in Respondents DE-24 or the magistrates Report is this issue addressed, the issue being in prison for serious bodily injury, which I am arguing is a miscarriage of justice.

In my objection (DE-29) page 5 I asked to proceed with my exhausted grounds - which included Ground one. The district court dismissed my petition and held "the Court finds that Acostas objections are not supported by law or evidence," (see DE-48, page 2). The issue of whether I was actually innocent of serious bodily injury never was addressed.

I then proceeded to state Court for my final Habeas Corpus (Ex parte ACOSTA WR-84-206-07). I presented this as an ineffective assistance of appellate Counsel claim and stated "I am actually innocent of committing serious bodily injury," (see Ground 23).

The states answer stated I failed to satisfy either Prong of Strickland v. Washington 466 US at 688, (states supplemental response page 4). The state presented an affidavit from Appellate Counsel and the opinion of the 13th Court of Appeals. The affidavit says nothing about the substance of Ground 23. Counsel states "the CoA issued a 15 page memorandum of opinion, attached as Exhibit A which answers Mr. Acostas complaints," (see States Exhibit 3).

The trial Court accepted the states answer and denied all relief. NO one (State, Counsel, Court - addressed the issue). The TCCA in Austin, TX affirmed and denied all relief.

I then returned to federal Court with an amended petition (Acosta v. Davis 2:19-cv-00008). This claim was raised in Ground three. The substance is I AM innocent of serious bodily injury. Cole v. Arkansas is cited. (see DE-1 - Ground Three).

Respondents motion for summary judgement (DE-26) labeled this claim as "an erroneous finding that the evidence was legally sufficient," (see DE-26, page 2). Respondent solely claimed the petition was time barred.

I then filed a Traverse (DE-36). On page 6, Part D - miscarriage of Justice, I argue actual innocence in another context but stated "since the sufficiency review in state Court was flawed (see grounds 1 & 2 in 2:16-cv-00149) a miscarriage of Justice occurred.

The district Court dismissed my Petition as time barred, (DE-50). Nowhere in the order is the issue addressed. The Court denied C.O.A and NO merit review occurred.

I then went to the 5th Circuit (Acosta v. Davis NO. 20-4012). In my Petition for C.O.A page 2 I state "I am actually innocent of committing serious bodily injury

and am serving a sentence that equates life without Parole." for Grand 3. Petitioner further stated the Court should consider its own holding in Hill v. Johnson 210 F3d 481 - "we resolve doubts about whether to grant a COA in petitioner's favor and may consider the severity of his penalty in determining whether he has met his substantial showing burden." (page 9), Petitioner then states actual innocence of committing aggravated assault under Tx. Penal Code 22.02(a)(2). (see page 14, section E)

The Court never addressed this issue and said I failed to make a substantial showing of denial of a Constitutional right and that Jurists of reason would not debate the procedural ruling was correct. (page 2 of document 00515515816),

Petitioner asks the Court to exercise its discretionary authority to correct this miscarriage of Justice, Petitioner argues the appellate Court decided an important federal question in a way that conflicts with relevant decisions of this Court and this Court should settle this question in the public interest to prevent future denial of Constitutional rights and life.

Petitioner is 48 years old in bad health. I have hepatitis C and see out of only one eye - with cataracts in both. I recently contracted Corona virus in July of this year and suffered mild brain damage. Some days I can not read or write. Some days I can't see. My first parole date is in 2072. I will die before then. It is an "aggravated sentence" so I'm not eligible for any early release.

My claim is not sufficiency of the evidence - its being affirmed in violation of Cole v. Arkansas. I'm actually innocent of committing serious bodily injury under Tx. Penal Code § 22.02(a)(1). Petitioner asks the Court to hold this innocence allows an exception to procedural default. This excuse would allow my first time petition to proceed on the merits. In Sawyer v. Whitley 112 S.Ct. 2514, this Court held "a miscarriage of Justice in the procedural bar context means that the petitioner is actually innocent of the crime of which he was convicted." It is this principle I ask to be applied. To this context, Cole v. Arkansas was decided before the AEDPA. It is not a matter of being innocent of any crime at all - but the crime I was affirmed on. Because the affirmation is what's legally binding here - not what the jury convicted on. Since I wasn't indicted or tried by jury for 22.02(a)(1) - I am actually innocent, in violation of my 5, 6, 14 amendment rights. Jurists of reason would agree the district court / appellate court was wrong in its procedural ruling because the miscarriage of Justice was apparent. This Court held in McGuinn v. Perkins 133 S.Ct. 1924 "the gateway should open only when a petitioner presents evidence of innocence so strong that a court can not have confidence in the outcome." My petition presents clear and indisputable evidence of innocence of guilt under 22.02(a)(1) that the court can not have confidence in the out-

No. _____ ①

Come of the Appeal, It is as if I never had an appeal. And I
ask the Court to Grant my writ in the interest of Justice.

NO. _____

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Conclusion

The foregoing Petition has been Submitted today the 5th. day of November, 2020,

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