20-8031

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MAJOR HUDSON III- PETITIONER

VS.

SCOTT NUNN, WARDEN- RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE 10TH

CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MAJOR HUDSON III
264410
James Crabtree Correctional Center, 216 North Murray Street, Helena, Oklahoma 73741-1017 216 N. MURRAY ST.
HELENA, OKLAHOMA 73741

PRO SE

QUESTIONS PRESENTED

1. WHETHER REASONABLE JURIST COULD FIND IT DEBATABLE THAT THERES AN EXTAORDINARY DIFFERENCE BETWEEN A MISDEMEANOR VS. A FELONY, AND WHETHER A PERSON WHO SHOULD HAVE BEEN SUBJECTED TO A MISDEMEANOR THAT CARRIES NO PRISON TIME VS. A FELONY THAT CARRIES 20 YEARS IN PRISON IS AN EXTRAORDINARY CIRCUMSTANCE THAT CONCERNS RULE 60 (b) (6)?

2. DOES AN EXCEPTION TO BECK V. ALABAMA (1980) AND KEEBLE V. U.S (1973), EXTEND TO A NON CAPITAL OFFENSE AS A MATTER OF THE DUE PROCESS CLAUSE OF THE 5TH AND 14TH AMENDMENTS, WHERE THE STATE'S EVIDENCE SUPPORTS A LESSER INCLUDED OFFENSE, WHICH IS A MISDEMEANOR VS. A FELONY?

3. DOES THE RULING IN MURRAY V. CARRIER AND DRETKE V. HALEY EXTEND TO A FAILURE TO INSTRUCT ON MISDEMEANOR STATUTE, WHERE JURY COULD HAVE DETERMINED ACTUAL INNOCENCE OF FELONY STATUTE HAD NOT BEEN FOR TRIAL COUNSEL'S FAILURE TO REQUEST IT, AND DIRECT APPEALS COUNSEL'S FAILURE TO RAISE IT?

4. WHETHER DIRECT APPEAL COUNSEL'S FAILURE TO RAISE METORIOUS CLAIM SHALL AUTOMATICALLY BE CONSIDERED A PROCEDURAL DEFAULT FOR PURPOSES OF FEDERAL REVIEW UNDER COLEMANN V. THOMPSON (1991), WHERE CLAIM HAS NEVER BEEN HEARD ON THE MERITS IN ANY COURT AND JURY COULD HAVE DETERMINED ACTUAL INNOCENCE OF SUBSTANTIVE STATUTE?

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TABLE OF AUTHORITIES

STATE CASES:

OPINION(S) BELOW

The opinion of the United States 10th circuit court of appeals appears at appendix (A) Unpublished.

JURISDICTION

The date on which the United States court of appeals decided the case was January 6, 2021.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. Six: In all criminal prosecutions, the accused shall have the assistance of counsel for his defense. This assistance must be effective (Strickland v. Washington) (Evitts v. Lucey).

U.S. Const. Amend. Fourteen: Provides in part: nor shall any state deprive any person life, liberty ... without due process of law.

Rule 60 (b) (6): Permits a court to reopen a judgment for any reason that justifies relief.

Title 21 O.S. sec. 1438: Illegal entry: (A) every person who under circumstances not amounting to any burglary, enters a building or part of any building, booth, tent, warehouse, railroad car vessel, or other stricter, or errection with intent to commit any felony, or malicious mischief, is guilty of a misdemeanor.

Title 21 O.S. sec. 1431: First Degree Burglary.

LIST OF PARTIES

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

RELATED CASES

Hudson v. State, No. F-1998-695, Okla. Court of Criminal Appeals, Judgment entered Aug. 23, 1999.

Hudson v. State No. Cf- 96-6675, Okla. Trial court, Judgment entered Jul. 6, 2000

Hudson v. State, No. PC-2000-1040 Okla.Court of Criminal Appeals, Judgment entered Oct.11, 2000

Hudson v. State, No. CF-96-6675, Okla. Trial court, Judgment entered Mar. 5, 2001.

Hudson v. State, No. PC- 2001-329, Okla. Court of Criminal Appeals Judgment entered on Aug. 1, 2001.

Hudson v. Saffle, No. CIV-01-258-W, U.S. District Ct. For The Western Dist. Okla. Judgment entered Jul. 20 2001.

Hudson v. Saffle, No. 01-6296, U.S. Court of Appeals for the 10th Circuit Judgment entered Feb. 7, 2002.

Hudson v. State, No. CF- 96-6675, Okla. Trial court, Judgment entered Nov. 25, 2003.

Hudson v. State, No. CF- 96-6675, Okla. Trial court, Judgment entered Mar. 17, 2016

Hudson v. State, No. PC-2016-250, Okla. Court of Criminal Appeals, Judgment entered Jun. 1, 2016.

In re Major Hudson III, No. 16-6270 Slip Op. at U.S. Court of Appeals for the 10th Circuit, Judgment entered Oct. 20, 2016.

Hudson v. State, No. Cf-96-6675, Okla. Trial Court, Judgment entered Jun. 27, 2018.

Hudson v. State, No. PC-2018-745, Okla. Court of Criminal Appeals Judgment entered Feb. 19, 2019.

In re Major Hudson III, No. 19-6054, Slip Op. at 2 U.S. Court of Appeals for the 10th Circuit, Judgment entered on May. 1, 2019.

Hudson v. Whitten, No. CIV-01-258 G, U.S. Dist. Ct. for the Western Dist. Okla. Judgment entered Sep. 3, 2020.

Hudson v. Denton, No. CIV-01-258 G, U.S. Dist. Ct. for the Western Dist. Okla. Judgment entered Sep. 16, 2020.

STATEMENT OF THE CASE

On January 23-26, Mr. Hudson represented by counsel, was tried by jury for the following offenses: Count One, rape in the first degree, Count two, burglary in the first degree, Count three, child abuse and Count four, Threatening a witness. The jury returned a verdict of guilty on all counts and set punishment at 53 years, 20 years, 10 years, and 7 years. On May 13, 1998, the court sentenced Hudson in accordance with the jury's verdict and ordered the sentences to be served consecutively.

Mr. Hudson by and through counsel, filed a direct appeal to the Oklahoma Court of Criminal Appeals raising the following assignments of error: 1. The evidence of other crimes denied appellant a fair trial. 2. The evidence was insufficient to support the convictions; 3. Defense counsel was ineffective for eliciting an improper reference to appellant's rights to remain silent an to an attorney for failing to ensure a complete record for appeal; 4. The sentences imposed are excessive. On August 23, 1999, the OCCA affirmed judgment and sentence in case No. F-1998-695.

Those claims above were brought in Mr. Hudson's first habeas petition. Hudson v. Saffle, No. CIV-01-258-W (Dist. Ct) and No. 01-6296 (10th Cir.). But however in this instant case the issue being brought herein, is that trial counsel and appellate counsel were both ineffective for failing to request a lesser included offense, **a misdemeanor vs. a felony**. Where the jury could have found Mr. Hudson actually innocent of the felony. The failure of the trial court not to instruct sua sponte, trial counsel's failure to request it and direct appeal counsel's failure to raise it, resulted in a miscarriage of justice. Murray v. Carrier.

REASONS FOR GRANTING THE PETITION

The 10th circuit and district court both abused their discretion by failing to consider the catch all category Rule 60 (b) (6) and determine whether Mr. Hudson who should have been subjected to a **misdemeanor** instruction vs. a felony instruction, was an extraordinary circumstance triggering the Rule. Instead the 10th circuit's conclusion tested solely on the fact that this was not newly discovered evidence, but a second or successive habeas petition. See, appendix (A),(B) and (C).

Because a misdemeanor carries no prison term and a felony does, Mr. Hudson's sixth and fourteenth amendments rights to a fair trial and a fair direct appeal were violated. See, Strickland v. Washington, 466 U.S. 668,686, 104 S.Ct 2052 80 L.Ed.2d 674 (1984); Evitts vs. Lucey, 105 S.Ct at 830 (1985). The jury could have found Mr. Hudson actually innocent of first-degree burglary and guilty of illegal entry. See, Kaulaity v. State, Ok.Cr.App. 40, 859 P.2d 521, 523 (1993) (holding illegal entry is a lesser included offense of burglary and attempted burglary and overruling prior contrary cases). Also see, Title 21 O.S. sec. 1438 Illegal Entry: (A) every person who under circumstances not amounting to any burglary, enters any building or part of any building, booth, tent, warehouse, railroad car, vessel, or any other structure or errection, with intent to commit any felony or malicious mischief, is guilty of a **misdemeanor**.

This claim has never been on the merits in any court, because the direct appeal attorney who represented Mr. Hudson failed to raise it. Nevertheless, trial and direct appeal counsel's failure resulted in an extraordinary circumstance triggering Rule 60 (b) (6), because a **misdemeanor** vs. a felony is like night and day.

Furthermore, granting Certiorari in this case is of national importance, and calls For the exercise of this Court's Supervisory Power to determine whether the Failure to give a misdemeanor instruction vs. a Felony instruction is an extraordinary circumstance, where one statute carries "no" Prison term and the other does. and whether a Failure to hear this claim on the merits would result in a miscarriage of justice, because of the "liberty" involved. Indeed, effective assistance of trial counsel and effective assistance of direct aPPeal Counsel are inextricably Connected elements of a Fair trial, Constitutionally SPeaKing. As, Justice FranKFurter exPlained in his oPinion in Brown v. Allen, 344 U.S. 443, 498, 73 S.Ct. 397, 441, 97 L.Ed 469 (1953) (the meritorious Claims are Few, but our Procedures must ensure that those Few Claims are not stifled by undisciminating generalities. The Complexities of our Federalism and the working of a schem of government involving, the interPlay of two governments one of which is subject to limitations enforced by the other, are not to be escaPed by simple, rigid rules which by avoiding some abuses, generate others)). The very nature of the writ demands that it be administered with the initiative and Flexability essential to ensure that "miscarriages" of justice within its reach are surFaced and "corrected." FranK v. Mangum, 237 U.S. 309, 346, 35 S.Ct. 582, 594, 59 L.Ed. 969 (1915) (Justice, Holmes, dissenting).

When both trial counsel and appellate counsel are in effective denying a right to a fair trial and fair appeal, this is a miscarriage of justice, where the jury could have found Mr. Hudson actually innocent of the substantial statute. See, Murray v. Carrier, 477 U.S. 478 (1986); Dretke v. Haley, 541 U.S. 386 158 L.Ed.2d 659, 1244 S.Ct. 1847 (2004).

SEE RULE 60 (b) (6)

The section permits a court to reopen a judgment for any reason that justifies relief. 60 (b) (6), vest wide discretion in courts, but relief under the Rule is available only in extraordinary circumstances. See, Gonzalez, 545 U.S. at 535 125 S.Ct 2641. In determining whether extraordinary circumstances are present, a court may consider a wide range of factors. These may include injustice to the parties and the risk of undermining the public's confidence in the judicial process. Liljeberg v. Health Serv. Acquisition Corp. 847-863, 108 S.Ct 2194, 100 L.Ed 855 (1988).

In this instant case, the underlying offense is first degree-burglary, Title 21 O.S. sec. 1431, for which Mr. Hudson received a 20 year sentence. However, evidence was introduced by **both** the state and defense that show Mr. Hudson was allowed in the apartment with consent.

STATE WITNESS TESTIMONY:

(Eyewitness Joyce Poco) (Tr.Transcript Vol. 1 pg. 50 lines 15-25) (By defense counsel)

15 Q. Now when the defendant arrived at the apartment, did you

16 And the defendant have any discussions

17 A. He spoke to me and said hi, and I said hi

18 Q. Did you show him pictures of your family?

19 A. I don't recall if I did or not. I don't recall.

20 Q. Did Melissa act like she didn't want Mr. Hudson there?

21 A. The only way that I can answer that is that I felt that

22 there was nothing unusual, you know.

23 Q. Did she act like he was a stranger?

24 A. Well she acted like she couldn't remember his name?

25 Q. But did she act like-

(Tr. Transcript Vol. 1 pg. 51 lines 1-4)

1 A. But she acted like she didn't know who he was, no.

2. Q. Did you ever hear her say, no you can't come in or you

3 must leave?

4 A. No, I did not.

(Defense Witness Testimony) (Mr. Hudson) (Tr.Transcript Vol. 2. pg. 64 lines 1-18) (By defense counsel):

1 Q. And did you have an occasion to go to her apartment early

2 October 96?

3 A. Yes

4 Q. What was the reason for going?

5 A. I just called her up one day and asked her what was she

6 doing and did she want some company and she said yes and I

7 came over.

8 Q. Do you recall the date that was?

9 A. October 5th

10 Q. And what time did you get there?

11 A. Oh, between 10,10:30

12 Q. And what did you do first when you got there?

13 A. I knocked on the door. She answered the door. I came in.

14 And she introduced me to a lady by the name of Ms. Poco and

15 We just had a conversation, the three of us and her son.

16 Q. What did you guys talk about?

17 A. Ms. Poco showed me pictures of her grandchildren, two

18 Little boys. Then pictures of how her and her husband met.

Had direct appeal counsel raised this claim, it would have required reversal on appeal. This is confirmed by the vast amount of cases the OCCA have reversed in the past. See, Roberts v. State, 29 p.3d 583 Ok.Cr.App. (2001); Dawson v. State, 647 p.2d 447, 449 Ok.Cr.App. (1982); Dixon v. State, 545 p.2d 1262 at 1265 (1976); Ballard v. State, 31 p.3d Ok.Cr.App. 20 (2001); Atterberry v. State, 731 p.2d 420, 422 Ok.Cr.App. (1986)(holding although the appellant

failed to object to the instruction and participated in there formulation, it was fundamental error for the trial court to misinstruct on an essential element of the offense). **Also see, appendix (D) Order denying post-conviction relief in an earlier petition, where the state district judge stated "(SIC) Petitioner's allegations do meet his burden of demonstrating counsel's performance was outside the wide range of competence expected of counsel in criminal cases.**

In this light, it stretches credulity to characterize Mr. Hudson's [ineffective assistance of counsel], claim as run-of-the mill. Especially since the lesser-included offense instruction that should have been given is **a misdemeanor** that carries no prison time vs. a felony that carries 20 years in prison. This is the type of extraordinary circumstance that calls for Rule 60 (b) (6) relief. See Buck v. Davis, 137 S.Ct. 759, 197 L.Ed.2d 1, (2017). The 'liberty interest' involved here is enormous. This Rule 60 (b) (6) holding, Mr. Hudson challenges would be reviewed for abuse of discretion during a merits appeal. See, 11c Wright A. Miller, and M. Kane, Federal Practice and Procedure Section 2857 (3ed. 2012).

EXCEPTION TO BECK AND KEEBLE SHOULD APPLY:

See, Keeble v. United States, 412 U.S. 205, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973) (the standard announced by the Supreme Court, is that regardless of the weight of the evidence, a defendant is entitled to lesser-included offense instruction, if the evidence would allow a rational jury to convict him of the lesser offense and acquit him of the greater. See, Beck v. Alabama, 447 U.S. 625 100 S.Ct 2382 65 L.Ed.2d 392 (1980).

THE RULING IN MURRAY V. CARRIER AND DRETKE V. HALEY SHOULD APPLY

This Court recognized in Murray v. Carrier 477 U.S. 478 (1986), a narrow exception to the cause requirement where a constitutional violation has probably resulted in the conviction of one who is actually innocent of the substantive offense. Also this Court ruled in Dretke v. Haley, 541 U.S. 386, 158 L.Ed.2d 659, 124 S.Ct. 1847 (2004) that a federal court must look for alternative grounds for relief. Moreover, the reasoning of those cases should apply here, where the failure to instruct on **a misdemeanor statute** violated substantial rights, when the jury could have determined "actual" innocence of the felony statue, if it had not been for trial counsel's failure to request the instruction. A failure to hear this claim would result in a miscarriage of justice.

THE RULING IN COLEMAN V. THOMPSON SHOULD APPLY

Because direct appeal counsel failed to raise this claim that would have required reversal under Evitts v. Lucey, 105 S.Ct. at 830 (1985), this should be considered a procedural default for purposes of federal review, under Coleman v. Thompson, 501 U.S. 722, 752-753,111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). **As this claim has never been heard on the merits in any court**.

OPINIONS OF SIX JUSTICES

Finally, in deciding this case this Court should consider the following opinions of six justices of this Court: (1) Maples v. Thomas, 565 U.S. 266, 132 S.Ct. 912, 181 L.Ed.2d 807 (2012) (Justice Scalia's dissenting opinion: when an attorney's error occurs at a stage of the proceedings at which the defendant has a constitutional right to effective assistance of counsel, that error may constitute cause to excuse a resulting default. A state's failure in its duty to

provide an effective attorney as measured by the standard set forth in Strickland v. Washington, makes the attorney's error chargeable to the state, and hence external to the defense, Murray Supra, at 488, 106 S.Ct. 2639);. (2) Justice Thomas's opinion in Davila v. Davis, id at 137 S.Ct. 2068 (2017) (If an unpreserved error was so obvious that appellate counsel was constitutionally required to raise it on appeal, then trial counsel likely provided ineffective assistance... In that circumstance, the petitioner could invoke Martinez or Colemann to obtain review of trial counsel's failure)); (3) Justice Breyer, (4) Justice Ginsburg, (5) Justice Sotomayor, and (6) Justice Kagan (dissenting id at 137 S.Ct. 2072 Davila v. Davis) Justice Breyer gave two examples: (Ineffective assistant of trial counsel) Suppose that on collateral review, the prisoner fails to bring up his ineffective assistance claim, perhaps because he is no longer represented by counsel or because his counsel there is ineffective. Under these circumstances, if his ineffective claim is a "substantial" one, i.e. it has "some merit" then Martinez and Trevino hold that a federal court can hear the claim even though the state habeas court did not consider it. See, Trevino, Supra, at 429, 133 S.Ct. 1911; Martinez, Supra at 132 S.Ct. 1909. The fact that the prisoner had no lawyer in the initial state habeas proceeding (or his lawyer in that proceeding was ineffective) constitutes grounds for excusing the procedural default. Example Two (ineffective assistance of appellate counsel) Now supposed that a prisoner claim that the trial court made an important error of law, say improperly instruction the jury... He believes his lawyer on direct appeal should have raised those errors because they led to his conviction. The appellate lawyer's failure to do so, the prisoner cannot make this argument on direct appeal, for the direct appeal is the very proceeding in which he is represented by the lawyer he says was ineffective. As I have said, the constitution guarantees them effective assistance of counsel at

both trial and during an initial appeal. See Strickland v. Washington, (trial); Evitts, Supra, at 396, 105 S.Ct. 830 (appeal).

Finally, Mr. Hudson's ground for relief is his ineffective assistance of trial counsel claim, a claim that, the AEDPA does not bar. Hudson relies on the ineffectiveness of his direct appeal attorney to excuse his failure to comply with procedural rules, not as an independent basis for overturning his conviction. In short, while section 2254 (i) precludes Hudson from relying on the ineffectiveness of his direct appeal attorney as a "ground for relief" it does not stop Hudson from using it to establish "cause" Holland v. Florida, 560 U.S. _,_, 130 S.Ct. 2549, 2563, 177 L.Ed.2d 130 (2010).

Because the jury could have found Mr. Hudson "actually innocent" of the felony statute and guilty of the **misdemeanor statute,** if had not been trial counsel's failure to request it, denied Hudson a right to a fair trial. And direct appeal attorney's failure to raise this claim, denied Hudson a right to a fair appeal in the first instance. A failure to give a **misdemeanor** instruction vs. a felony instruction is an extraordinary circumstance. Liljeberg v. Health serv. Acquisition Corp. 847-864, 108 S.Ct. 2194 (1988); Buck v. Davis, 137 S.Ct. 759, 197 L. Ed.2d 1 (2017).

CONCLUSION

Wherefore the reasons and authorities cited herein, Mr. Hudson respectfully prays, this Honorable Court reverse and remand this case, back to the lower court for a determination on whether trial counsel was ineffective under Strickland v. Washington and whether appellate counsel was ineffective under Evitts v. Lucey. In the alternative reverse for a new trial.

Respectfully Submitted,

Major Hudson III / 3-23 / 2021

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I Declare under Penalty of Perjury that the Foregoing is true and correct. Executed on ___/___/___

Major Hudson III