

21-5058

No. _____

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED

JUN 02 2021

OFFICE OF THE CLERK

JOSEPH ANDREW PHIPPS, — PETITIONER
(Your Name)

vs.

NEIL McDOWELL, Warden, — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. District Court of California/Central District
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Joseph Andrew Phipps CDCR#AY1198
(Your Name)

B 3-1-4 Low, Po Box 2349
(Address)

Blythe, CA. 92226
(City, State, Zip Code)

N/A

(Phone Number)

QUESTION(S) PRESENTED

- 1) Does Petitioner have a due process right to jury instructions on lesser included offenses?
- 2) Does the Equal Protection Clause of the 14th Amendment require the holdings in Beck v. Alabama, 477 U.S. 625 (1980) to apply to noncapital cases?
- 3) Do this Court's holdings in Beck v. Alabama, (supra) apply to noncapital cases?
- 4) Does the void in protection created by the AEDPA lie to vindicate the guarantee of due process by the 5th and 14th Amendments in this case and cases similarly situated?
- 5) Does the void in protection created by the AEDPA lie to vindicate the guarantee of equal protection by the 14th Amendment in this case and cases similarly situated?
- 6) Is the admission of irrelevant or overtly prejudicial evidence a violation of the due process clauses of the 5th and 14th Amendments?

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OTHER

LIST OF PARTIES

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

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

Any related cases are unknown to petitioner at this time.

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was Jan. 15, 2021.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

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

For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. §2254(d);

An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgement 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.

U.S. Constitution Amendment V;

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in 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 offense 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. Constitution Amendment 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; noe shall any State deprive any person of life, liberty, or property, without due procees of law; nor deny to any person the equal protection of the laws.

Judicial Oath 28 U.S.C. §453;

I, _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me God.

STATEMENT OF THE CASE

To save time and valuable judicial resources and to avoid being repetitive petitioner will rely on the statement of facts and the procedural history contained in the Magistrate's R&R. He will only discuss the pertinent portions of the case as they pertain to his arguments in support of his questions of law.

Petitioner was convicted of killing his wife during an argument. He was tried for first degree murder, and the jury found guilt for second degree murder on July 17, 2015. Petitioner filed a timely appeal in the State Appellate Court raising 11 claims of Constitutional error. All 11 claims were denied and this conviction affirmed. He then filed a timely petition for review in the California Supreme Court which denied review without comment.

On June 16, 2018 Petitioner filed a petition for writ of habeas corpus in the United States District Court, Central District of California pursuant to 28 U.S.C. 2254. On August 16, 2019 The U.S. Magistrate filed his Report and Recommendation with the District Judge. On September 26, 2019 District Judge Percy Anderson adopted the R&R and denied and dismissed the petition with prejudice and at the same time denied COA. Petitioner then filed a timely petition with the 9th Circuit Court of Appeals requesting that COA be issued. On January 15, 2021 the 9th Circuit denied COA.

Per this Court's order Dated March 19, 2020 extending allowed time for filing a petition for certiorari to 150 days from date of lower court's judgement, Petitioner's due date is June 14, 2021. Thus, this petition must be considered timely.

In Petitioner's 28 U.S.C. 2254 petition he raised 11 claims of Constitutional violation. (see appendix C) Of the 11 claims only

two involved unsettled questions of law that this Court has not yet established, claims II and III. (see appendix B & C)

In Claim II Petitioner argued that he had a Constitutional right to and the State had a sua sponte duty to instruct on the lesser included offense of Imperfect Self Defense.

In the Report and Recommendation the Magistrate correctly cites Federal law concerning the right to jury instructions regarding lesser included offenses. Citing Beck v. Alabama, 477 U.S. 635, 638 (1980) he stated;

In Beck v. Alabama, 477 U.S. 625, 638 (1980), the United States Supreme Court held that a defendant in a capital case has a constitutional right to a jury instruction regarding a lesser included offense supported by the evidence. The Supreme Court, however, has not decided whether due process requires lesser included offense instructions to be given in noncapital cases. (R&R pp. 18-19)

The Magistrate goes on to argue that Petitioner's claim is further barred by the Teague rule, but relied primarily on the "foreclosure" of relief created by the A.E.D.P.A. concerning instructions on lesser included offenses. When passing on the Merits of the claim, the Magistrate states;

Thus Ground Two does not assert a constitutional error upon which habeas relief can be granted. In addition, AEDPA forecloses relief. Because no Supreme Court authority holds that a defendant has a constitutional right to a jury instruction on a lesser included offense in a noncapital case... (R&R p.21)

Had this Court established that the holdings in Beck (supra) applied to noncapital cases in the past, the Teague argument would have been a moot issue. Moreover, The Magistrate misapplied Teague because the new rule established would have been a "watershed" rule and would have effected thousands of people. But the Teague argument is irrelevant to the instant petition.

The fact that this Court has not yet said that the holdings in Beck (supra) apply to noncapital cases completely foreclosed relief in this case. The Federal Court is barred from applying the due process clauses of the constitution by the AEDPA and 28 U.S.C. 2254 (d).

The second unsettled question of law is found in claim three of the petition and the Magistrates R&R. At trial the State used a "Gun Expert" to give a "demonstration" to show that the victim could not have shot herself in the manner that the defense claimed happened.

Using a replica gun that was different than actual firearm used in the crime, the expert reenacted the way in which a right handed person would have had to hold the gun in order to shoot herself in the left temple. He tried to show that it would have been impossible.

The Federal petition argued that this evidence was extremely prejudicial because the replica gun was not the same size and the reenactment did not take into account the fact that the defendant's version of the facts were that he was struggling with his wife over the gun when it went off. Thus there were no influences of arms being bent and forced into odd positions during the reenactment. These issue rendered the expert's demonstration not only irrelevant but was also overtly prejudicial.

In the Magistrate's R&R he opens his "Analysis" by stating;

To obtain federal relief, Petitioner must show that the Court of Appeal unreasonably applied clearly established federal law as set forth by the United States Supreme Court when it concluded that the replica gun demonstration did not violate due process. 28 U.S.C. 2254(d)(1). Because the Supreme Court has never clearly held that admission of irrelevant or overtly prejudicial evidence may violate due process so as to warrant federal habeas relief, Holly, 568 F.3d at 1101, "there was no clearly established federal law for the State Court's determination to contravene" Pena v. Tilton, 578 Fed. Appx. 695, 695 (9th Cir. 2014). "When there is no clearly established federal law on an issue, a state court cannot be said to have, unreasonably applied the law as to that issue."

Holly, 568 F.3d at 1098 (citing Musladin, 549 U.S. at 77). Thus Petitioner's claim fails under AEDPA.

Thusly, the Magistrate was barred from granting relief even if he had of found that the admission of the expert evidence was a violation of due process. Federal District Courts are barred under the AEDPA from making such judgement calls.

For the prupose of this petition, these are the only two Grounds raised.

REASONS FOR GRANTING THE PETITION

ARGUMENT FOR BECK V. ALABAMA

In 1980 This Court decided in Beck v. Alabama, 477 U.S. 625, 638 (1980) that;

the death penalty may not be imposed, "when [***822] the jury was not permitted to consider a verdict of guilt of a lesser included noncapital offense, and when the evidence would have supported such a verdict. 477 U.S., at 627 100 S.Ct. 2382, 65 L.Ed.2d. 392.(Internal quotation marks omitted). We explained that such a scheme intolerably enhances the "risk of an unwarranted conviction."

Then in 1996 Congress passed the Anti Terrorism and Effective Death Penalty Act known as the AEDPA. The AEDPA altered 28 U.S.C. 2254 and curtailed a federal court's ability to intervene in a State court conviction.

28 U.S.C 2254 (d) reads;

An application for writ of habeas corpus on behalf of a person in custody pursuant to a judgement 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.

In this case, and many like it, the United States District Court was restricted from deciding if Petitioner's due process rights were violated because of a void created by the AEDPA and this Court's silence on whether or not the holdings in Beck (supra) apply to noncapital cases.

Petitioner has argued that he had a due process right to have his jury instructed on the lesser included offense of imperfect self defense

in his federal habeas petition. The District Court ruled that due to the dictates of the AEDPA and the fact that the Supreme Court has not yet made clear that the holdings in Beck v. Alabama, 477 U.S. 625 apply it cannot be said that the State court's denial of this same issue was contrary to or an unreasonable application of Beck. (supra)

Thus, Petitioner was denied consideration of his claim of due process violation. This is a void in the application of the right to due process guaranteed by the 5th and 14th Amendments of the Constitution. In other words, this petitioner is being denied due process of law because of a glitch in the system. He has a right to have a Federal court decide if he has a due process right to a jury instruction on lesser included offenses. This glitch is being caused by this Court's silence on an unanswered question of law.

Perhaps this Court has not answered this question in the past because it would create a "watershed" rule that would open a flood gate of cases in the courts nation wide. However, this should not be a determent. One of the very first qualifications for the granting of certiorari is that the answer to the question of law must effect a large portion of the population. This would certainly qualify.

Moreover, Petitioner has an equal protection right to the same due process as Beck. The 14th Amendment guarantees equal protection;

U.S. Constitution Amendment 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 the equal protection of the laws.

Per the equal protection clause of the 14th Amendment, this right extends to Petitioner in this case and is cause for this Court to grant certiorari and vindicate Petitioner's due process rights. Moreover, each and every Honorable Justice now sitting on this bench swore in their judicial oath to do equal right to all citizens;

Judicial Oath 28 U.S.C. §453; I, _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me God.

If this Court is to do equal right and faithfully discharge and perform all duties incumbent upon it, then this petition must be granted.

The Court may argue that there is a distinction between Petitioner's case and that of Beck. Perhaps the Court may feel that a capital case should be treated different from a noncapital case. Petitioner argues in opposition.

In Bobby v. Mitts, 563 U.S. 395 131 S.Ct. 1762 179 L.Ed.2d 819, This Court opined;

The logic of the United States Supreme Court's decision in Beck is not directly applicable to penalty phase proceedings. The concern in Beck regarding the risk of an unwarranted conviction is simply not translateable to the deliberative process in which the capital jury engages in determining the appropriate penalty.

In other words this Court's focus in Beck was not on the penalty for the crime if convicted but on the risk of an unwarranted conviction. Thus, It cannot be said that the due process right to a jury instruction on lesser included offenses does not apply to all criminal defendants, as all criminal defendants are at risk of unwarranted convictions.

ARGUMENT AGAINST ADMISSION OF
IRRELEVANT OR OVERTLY PREJUDICIAL EVIDENCE

In Ground III of Petitioner's Federal Habeas petition, he argued that the trial court violated due process when it allowed the admission of evidence that was irrelevant or overtly prejudicial. The evidence was a demonstration performed by the State's firearm expert. The defense objected to the demonstration because the expert used a replica gun that was different in size from the actual firearm in the case. Moreover, the expert did not demonstrate the effects of arms and wrists being twisted in unnatural angles during a struggle. The evidence was very prejudicial and should not have been admitted.

The District Court foreclosed relief on this issue because the Supreme Court has never established the admission of irrelevant or overtly prejudicial evidence as a violation of due process. Citing the AEDPA the Court said;

To obtain federal habeas relief, Petitioner must show that the Court of Appeal unreasonably applied clearly established federal law as set forth by the United States Supreme Court when it concluded that the replica gun demonstration did not violate due process. 28 U.S.C. §2254(d)(1). Because the Supreme Court has never clearly held that admission of irrelevant or overtly prejudicial evidence may violate due process so as to warrant federal relief, Holly, 586 F.3d at 1101, "there was no clearly established federal law for the state court's determination to contravene." Peña v. Tilton, 758 Fed. Appx. 695, 695 (9th Cir. 2014). "When there is no clearly established federal law on an issue, a state court cannot be said to have unreasonably applied the law as to that issue." Holly, 568 F.3d at 1098 (Citing Musladin, 549 U.S. at 77). Thus, Petitioner's claim fails under AEDPA.

As in Beck v. Alabama we have a void where due process cannot reach. Review is foreclosed in this claim because the AEDPA restricts federal court intervention and the Supreme Court has not clearly established the rule of law concerning the admission of irrelevant or overtly

prejudicial evidence.

Again, this issue is another "watershed" question that the answer would effect thousands of people. Anytime a citizen of the United States petitions a Federal Court to decide a question of law that is of Constitutional magnitude, the court should not turn that petitioner away without an answer. The due process clauses of the 5th, 6th, and 14th Amendments guarantee all citizens the right to be heard and answered. It is axiomatic.

Both these issues, the question concerning Beck and the question concerning the admission of irrelevant or overtly prejudicial evidence begs answers. A flaw in due process protection has been created by the AEDPA and it must be addressed. It is the sworn duty of this Court to address it.

In conclusion Petitioner prays this Court will fill the void created by the AEDPA and the answered questions of law. It is well within the Court's power and duty to ensure that the rights and protections created by the 5th, 6th, and 14th Amendments are administered equally and that there are no areas of the law where those rights and protections cannot reach.

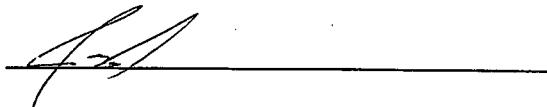
The question concerning Beck has been left unanswered for far too long and due process demands an answer. Moreover, all criminal defendants should know whether or not they have a Constitutional right to not have irrelevant or overtly prejudicial evidence used against them.

Respectfully Submitted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 6-2-20

APPENDIX A