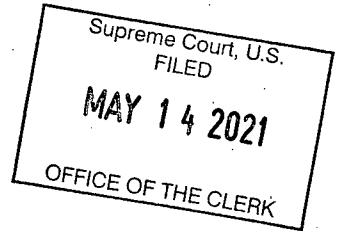


21-5145

No. _____

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



Richard Demon Donaldson — PETITIONER
(Your Name)

vs.

BOBBY LUMPKIN, Director — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO
AND APPLICATION FOR A CERTIFICATE OF APPEALABILITY

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Richard Demon Donaldson

(Your Name)

John M. Wynne State Farm
810 F.M. 2821, West Hwy. 75 North

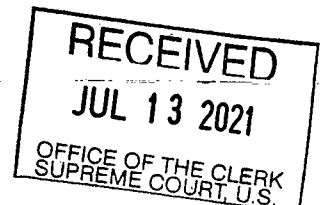
(Address)

Hunstsville, Texas. 77349-0005

(City, State, Zip Code)

(936) 295-9126

(Phone Number)



QUESTION(S) PRESENTED

QUESTION No. 1

WHETHER THE COURT OF APPEALS ERRED AND ABUSED ITS DISCRETION IN REFUSING AND/OR DECLINING TO ISSUE A CERTIFICATE OF APPEALABILITY UPON THE CONTENTION THAT THE PETITIONER FAILED TO MAKE THE REQUIRED SHOWING WHEN THE PETITIONER RAISED A FACIAL VALID CLAIM AND SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT IN ARGUING THAT HE WAS DEPRIVED OF HIS RIGHTS TO REASONABLE ASSISTANCE OF COUNSEL UNDER THE 6TH AMENDMENT TO THE UNITED STATES CONSTITUTION AND REASONABLE JURIST WOULD FIND THE DISTRICT COURT'S ASSESSMENT OF THE CONSTITUTIONAL CLAIM DEBATABLE OR WRONG WHEN THE DISTRICT COURT:

- (A) accorded difference and the presumption of correctness to the Findings of Fact and Conclusions of Law of the State habeas court that was explicitly rejected by the State's highest court;
- (B) held that the claim was adjudicated on the merits when under State law the claim remained pending in the State habeas court absent the issuance of mandate;
- (C) assessed the claim under the provisions of Title 28 U.S.C., Section 2254(d)(1) and (2) when the claim had not been adjudicated upon the merits in the State habeas court.

QUESTION No. 2

WHETHER THE PETITIONER HAS A STATUTORY RIGHT TO SEEK THE ISSUANCE OF A CERTIFICATE OF APPEALABILITY FROM A JUSTICE OF THE UNITED STATES SUPREME COURT AND THE CLERK OF THE UNITED STATES SUPREME COURT SUBVERTED AND IMPEDED THIS RIGHT BY MANDATING THE FILING OF THE INSTANT PETITION FOR A WRIT OF CERTIORARI?

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: Jennifer Wissinger, Assistant Attorney General, State of Texas, P.O. Box 12548, Austin, Texas. 78711-2548, Attorney for the Respondent.

RELATED CASES

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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.
or a Certificate of Appealability 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 B 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 A 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 December 09, 2020.

☐ 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: January 07, 2020, and a copy of the order denying rehearing appears at Appendix C.

☐ 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). This Court's jurisdiction is also invoked under Title 28 U.S.C., Section 2253(c)(1)(A).

☐ 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

Title 28 U.S.C., Section 2253(c)(1)(A)

Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from; the final order in a habeas corpus proceeding in which the detention complained of arises out of a process issued by a State court.

Title 28 U.S.C., Section 2254(d)(1) And (2)

(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 at the State court proceeding.

Title 28 U.S.C., Section 2254(e)(1)

In a proceeding initiated by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of the factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

Petitioner was convicted for the alleged offense of Continuous Sexual Assault. (Appendix-A; p. 108).

Petitioner initiated a federal habeas proceeding pursuant to Title 28 U.S.C., Section 2254 et seq. before the United States District Court for the Northern District of Texas, Fort Worth Division, on October 03, 2018, in No. #4:18-CV-0816-A, Styled: Richard Demon Donaldson v. Lorie Davis, Director, Texas Department of Criminal Justice-Correctional Institutions Division.

In a single ground for federal habeas relief, the Petitioner argued that he was denied his constitutional rights to effective assistance of counsel under the 6TH Amendment to the United States Constitution, because during the deliberation of the jury during the Guilt/Innocence Phase of the Petitioner's trial, the jury presented a note to the trial court requesting an answer to a hypothetical fact question of whether the mother of the alleged victim had the ability to stop the case before trial for any reason during the four (4) years. Absent any objection from trial counsel, the trial court answered the jury's question, that in regards to the question of whether the mother of the alleged victim had the ability to stop the case before trial was not in evidence before them. The Petitioner argued that in the absent of an objection by trial counsel, the trial court allowed and permitted to opionate a factual response to the jury contrary to the law.

The State habeas court entered a Findings of Fact and Conclusions of Law, finding that trial counsel agreed with the trial court

not to answer the substance of the Jury Note regarding whether the mother of the alleged victim could have prevented the case from going to trial because that was not evidence before them, and that trial counsel did not object to the trial court's answer to the Jury Note because he concluded it was proper, and his decision not to object was the result of reasonable trial strategy. The Texas Court of Criminal Appeals in its decision to deny the application without written order was not premised upon the Findings of Fact and Conclusions of Law of the State habeas court. (Appendix-A; p. 109).

On November 06, 2019, the district court entered a Memorandum Opinion and Order denying the Petitioner's federal habeas petition and a certificate of appealability. (Appendix-A; pp. 108-115).

The district court in its resolution of the Petitioner's claim for federal habeas relief gave difference to a factual issue that was not adopted by the Texas Court of Criminal Appeals, thus, there were no Findings of Fact and Conclusions of law accepted by the Texas Court of Criminal Appeals upon which the presumption of correctness applied. The district court furthered, that since the Texas Court of Criminal Appeals denied the Petitioner's State habeas application without written order, such was an adjudication of the Petitioner's claim for habeas relief on the merits. (Appendix-A; p. 110).

On December 09, 2020, the United States Court of Appeals for The Fifth Circuit denied the Petitioner's Application for A Certificate of Appealability. (Appendix-B). And on January 07, 2021 denied the Petitioner's Petition for Panel Rehearing. (Appendix-C).

to not answer the substance of the question presented in the Jury Note regarding whether the alleged victim could have prevented the case from going to trial because that was not in evidence before them, and that trial counsel did not object to the trial court's answer to the Jury Note because he concluded it was proper, and his decision not to object was the result of reasonable trial strategyy.

The Texas Court of Criminal Appeals explicitly rejected the Findings of Fact and Conclusions of Law made by the State habeas court and denied the Petitioner's State habeas application without written order rather than on the Findings of Fact and Conclusions of Law of the State habeas court. (Appendix-A; p. 109).

On November 06, 2019, the district court entered an unpublished Memorandum Opinion and Order denying the Petitioner's federal habeas petition and denied a Certificate of Appealability. (Appendix-A; pp. 108-115).

The district court in the resolution of the Petitioner's claim that he was deprived of his right to effective assistance of counsel gave difference to and applied the presumption of correctness to the Findings of Fact and Conclusions of Law that was explicitly rejected by the Texas Court of Criminal Appeals. The district court furthered, that since the Texas Court of Criminal Appeals denied the Petitioner's State habeas application without written order, such was an adjudication of the claim on the merits. (Appendix-A; p. 110).

On December 09, 2020, the United States Court of Appeals for the Fifth Circuit denied the Petitioner's Application for A

Certificate of Appealability. (Appendix-B). And on January 07,
2021, that court denied the Petitioner's Petition for Panel Rehearing.
(Appendix-C).

REASONS FOR GRANTING THE APPLICATION

Under Title 28 U.S.C., Section 2253(c)(1)(A) it is provided that "Unless a circuit justice or judge issues a certificate of appealability (COA), an appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding in which the detention complained of arises out of a process issued by a State Court. Thus, under the clear text of the statute a "Circuit Justice" of the United States Supreme Court has the authority and jurisdiction to issue a COA. Therefore, the foregoing application is properly before the Court. See., Rule 22 of the Supreme Court Rules.

To be entitled to a COA, a COA may issue under Section 2253(c)(1)(A) only if the applicant has made a substantial showing of the denial of a constitutional right. See., Title 28 U.S.C., Section 2253(c)(2).

Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy Section 2253(c)(2) is straight forward. The habeas petitioner must demonstrate that reasonable jurist would find the district court's assessment of the constitutional claim debatable or wrong. See., *Slack v. McDaniel*, 120 S.Ct. 1595 (2000). The habeas petitioner need not convince a judge, or, for that matter, three (3) judges, that he or she will prevail, but must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. See., *Miller-El v. Cockrell*, 123 S.Ct. 1029 (2003). This inquiry does not require or entail full consideration of the factual or legal basis supporting the claim. *Id.*

Clearly, a district court's use of the wrong legal standard of review in the assessment of a habeas petitioner's constitutional claim is wrong and debatable. Further, the question of whether a district court is required to review all of a habeas petitioner's constitutional claims that are reviewable from the record when those claims have been presented to the State habeas court for consideration is a matter of importance and interest in human liberty that such deserves further encouragement to proceed further.

In view of Title 28 U.S.C., Section 2254(d)(1) and (2) it is provided, that:

(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 at the State court proceeding.

It is the law of the Fifth Circuit, that the district court must determine whether the habeas petitioner's claims were adjudicated on the merits in the State court proceedings and is thus subject to the rigorous standard of review under Section 2254(d)(1) and (2). See., Jackson v. Johnson, 150 F.3d 520 (5th Cir. 1998).

In Moore v. Johnson, 101 F.3d 1069 (5th Cir. 1996); the State habeas court after conducting an evidentiary hearing on the issue, entered detailed findings of facts and conclusions of law holding that Moore had failed to show ineffective assistance of counsel.

The Texas Court of Criminal Appeals accepted the findings of the State habeas court and denied Moore's application for writ of habeas corpus. On these bases the Fifth Circuit held that there was no question Moore's ineffective assistance of counsel claims received a full and fair adjudication on the merits by the State habeas court. Cf., Singleton v. Johnson, 178 F.3d 381 (5th Cir. 1999); the State habeas court determined that the habeas relief requested by the applicant in that case should be granted and recommended to the Texas Court of Criminal Appeals that habeas relief be granted. The Texas Court of Criminal Appeals disagreed with the recommendation, because it denied the application without written order. Further, in Micheaux v. Collins, 944 F.2d 231 (5th Cir. 1991); the court of appeals held that the State habeas court's proposed findings of fact and conclusions of law did not survive the Texas Court of Criminal Appeals denial of habeas relief without written order because they were not adopted by that court in its decision to deny habeas relief.

As in this case, there is no Findings of Fact and Conclusions of Law that have been accepted and/or adopted by the Texas Court of Criminal Appeals in Order to deny habeas relief upon the Applicant's claim of ineffective assistance of counsel. There cannot even be the semblance of a full and fair hearing unless the State habeas court actually reached and decided the issue of fact tendered by the habeas petitioner. Thus, there are no findings made by the State habeas court upon which the presumption of correctness applies, nor were the claims adjudicated on the merits by the State habeas court. Cf., Jackson, Supra., the Texas Court of

Criminal Appeals denied relief without written order upon the findings of fact and conclusions of law of the State habeas court constituted an adjudication on the merits of the claim.

The district court in it's Memorandum Opinion embraced Section 2254(d)(1) and (2) as it's standard of review. See., (Appendix A; pp. 109-110). The district court also embraced Title 28 U.S.C., Section 2254(c)(1) upon the Findings of Fact and Conclusions of Law of the State habeas court that were neither accepted and/or adopted by the Texas Court of Criminal Appeals. See., (Appendix A; pp. 113 and 113). However, the district court concluded that since the Texas Court of Criminal Appeals denied the State habeas application without written order constituted an adjudication on the merits, citing Ex Parte Torres, 943 S.W.2d 469 (Tex.Cr.App. 1997), and thus, disavowing the established precedents of the Fifth Circuit to be used in the resolution of whether a claim has been adjudicated upon the merits.

Given the assessment of the Petitioner's ineffective assistance of counsel claim by the district court reasonable jurists could debate as to whether the district court used the correct standard of review, and that such was wrong when it reviewed the claim under the rigorous standard of review of Section 2254(d)(1) and (2).

Further, given the assessment made by the district court, there were no findings of fact and conclusions of law accepted and/or adopted by the Texas Court of Criminal Appeals upon which the presumption of correctness applied, as jurist of reasons could find this assessment by the district court debatable and wrong.

In view of the prior and previous disposition of this matter under Jackson, Moore, Singleton, and Micheauz, the Petitioner meets the requirements for the issuance of a COA.

The district court in assessing the Petitioner ineffective assistance of counsel claim based on the findings of the State habeas court concluded that the Petitioner failed to prove either prong of the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) to establish ineffective assistance of counsel.

Notwithstanding the erroneous review embraced by the district court upon the Petitioner's claim, the district court held that the information requested by the jury was not in evidence, and, contrary to the Petitioner's assertion, the trial court's response was non-substantive and neutral, however, the trial court's answer to the jury's question was however a direct comment as to the evidence, in that there was no evidence on this matter, a matter that was within the province of the jury to decide whether or not there was evidence to support a finding that the mother of the alleged victim had the ability to stop the case before trial for any reason during the four (4) years. What the purpose was by the jury for the question is a reason that could have only been answered and reached by the jury, thus, it would have been proper for the trial court to have instructed the jury that the matter was for them to decide upon the evidence, and on that matter, trial counsel should have objected.

Under federal law, Section 2254(d)(1) and (2) only applies to those claims adjudicated on the merits in the State court

proceeding.

The district court relied on the holdings under *Ex Parte Torres* for the proposition that the denial of the application without written order by the Texas Court of Criminal Appeals constituted an adjudication on the merits. However, under Texas law absent the issuance of mandate by that Court there is no final resolution and/or disposition of the issue or case before it. Cf., *Carter v. State*, 510 S.W.2d 323 (Tex.Cr.App. 1974); prior to the issuance of mandate a judgment is not final. Thus, in the absence of a mandate jurisdiction over a cause remains in the appellate court.

This Court has instructed that until an application for a writ of habeas corpus has achieved final resolution through the State's post-conviction procedures, by definition it remains pending. See., *Care v. Saffold*, 122 S.Ct. 2134 (2002). The district court fail to examine the particular State habeas procedure to determine when the process has reached completion or final resolution. See., *Payne v. Kemna*, 441 F.3d 570 (8th Cir. 2006), *Nyland v. Moore*, 216 F.3d 1264 (11th Cir. 2000).

Thus, absent the issuance of mandate by the Texas Court of Criminal Appeals, there has not been a final resolution and/or completion of the proceedings, notwithstanding an adjudication upon the merits of the claim. The district court did not reach this matter, and clearly fail to correctly analyze and apply the law correctly. Therefore, reasonable jurist would find the assessment of the Petitioner's constitutional claim debatable or wrong under Section 2254(d)(1) or (2). It is clear, that a question of the district court's jurisdiction is at issue.

The Petitioner originally tendered the instant Petition seeking the issuance of a certificate of appealability from a Circuit Justice of the Court, however, the Clerk of the Court declined to file the same and mandated the filing of the instant Petition, thus, subverting and depriving the Petitioner of the right to seek the issuance of a certificate of appealability from a Circuit Justice upon the determination made by the district court. The Petitioner enjoyed the right to seek the issuance of a certificate of appealability from a Circuit Justice under Title 28 U.S.C., Section 2253(c)(1)(2).

CONCLUSION

The petition for a writ of certiorari should be granted. or a certificate of appealability be issued in this case.

Respectfully submitted,



Richard Demon Donaldson

Date: July 01, 2021