

THE UNITED STATE COURT OF APPEALS

FIFTH CIRCUIT

JohnnR. Smith

4:18-CV-3578

v

Bobby Lumpkin

The Court of Criminal Appeals did deny the Petitioner's appeal on Dec 14, 2020. The Appeal was denied based on the Counsel's affidavit claiming that he did interview the eyewitness but decided not to call Mr. Spriggs to testify and that he did consider fingerprint testing but decided not to because victim's fimgerprints might be on the gun, and that he did not get the gun shot residue kit results because he was concerned there might be residue on both Smith and the complaint's hand. For this reason the Court of Appeal denied the Petitioner's Appeal.

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

December 28, 2020

No. 19-20716

Lyle W. Cayce
Clerk

JOHN RICHARD SMITH,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice,
Correctional Institutions Division,*

Respondent—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:18-CV-3578

Before WILLETT, Ho, and DUNCAN, *Circuit Judges.*

PER CURIAM:*

A jury convicted John Richard Smith, Texas prisoner # 2037971, of murder, and he was sentenced to 58 years in prison. He seeks a certificate of appealability (COA) to challenge the district court's denial of his 28 U.S.C. § 2254 petition in which he raised claims of prosecutorial misconduct and

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

No. 19-20716

ineffective assistance of trial counsel. Smith also alleges that the district court erred by denying habeas relief without conducting an evidentiary hearing.

To obtain a COA, Smith must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Where, as here, the claims are rejected on the merits, the prisoner must “demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong” or that the issues presented “deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks and citation omitted).

Smith has failed to meet this standard. As Smith fails to make the required showing for a COA on his constitutional claims, we do not reach whether the district court erred by denying an evidentiary hearing. *See United States v. Davis*, 971 F.3d 524, 534-35 (5th Cir. 2020).

Accordingly, Smith’s COA motion is DENIED.

ENTERED

September 24, 2019
David J. Bradley, Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

JOHN RICHARD SMITH ,
(TDCJ-CID #2037971)

Petitioner,

VS.

LORIE DAVIS,

Respondent.

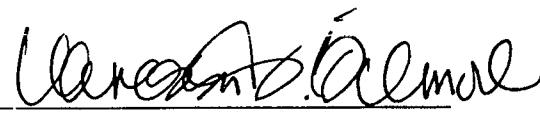
CIVIL ACTION NO. H-18-3578

FINAL JUDGMENT

For the reasons stated in this Court's Memorandum and Opinion entered this date, this civil action is DISMISSED with prejudice.

This is a FINAL JUDGMENT.

SIGNED at Houston, Texas, on Sept. 23, 2019.



VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

United States Court of Appeals
for the Fifth Circuit

No. 19-20716

JOHN RICHARD SMITH,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice,
Correctional Institutions Division,*

Respondent—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:18-CV-3578

ON PETITION FOR REHEARING

Before WILLETT, Ho, and DUNCAN, *Circuit Judges.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

es,

“(Appendix C”)

CAUSE NO. 1395401-A

EX PARTE

vs.

JOHN RICHARD SMITH
Applicant

IN THE 263rd

DISTRICT COURT OF

HARRIS COUNTY, TEXAS

AFFIDAVIT

Before me, the undersigned authority, on this day personally appeared Jerome Godinich Jr., who after being duly sworn stated the following:

I, Jerome Godinich Jr. was appointed to represent Mr. Smith on July 26, 2013. Mr. Smith was charged with murder. Prior to trial, I spent a great deal of time with Mr. Smith. My investigator John Castillo and I thoroughly investigated the facts of the case. We went to the crime scene several times, walked from one location to the next and attempted to or did contact every available witness. Mr. Smith was visited often and participated in our discovery. I have reviewed the applicant's writ.

Response:

Applicant's first ground

Yes, fingerprint testing was considered. However, given Mr. Smith's version of the facts where he gives the gun to the complainant and later retrieves the weapon, it would not have helped his defense.

Applicant's second ground

Yes, shot gunshot residue testing was considered. However, given Mr. Smith's version of the facts both prior to and during trial that he grabbed her wrist, there was a major concern that residue would be present on his hands and not on the complainant's. The other concern was that residue would be located on both Smith's and complainant's hands due to the close range of the shooting. This would not necessarily benefit Mr. Smith.

Applicant's third ground

Yes, defense did seek out and interview George Spriggs. In September 2015, the defense team began searching for three potential witnesses. These witnesses were Mr. George Spriggs, Mr. Johnson and Ms. Sekeisha Jacobs. We located and interviewed Mr. Spriggs and Ms. Jacobs on September 9, 2015.

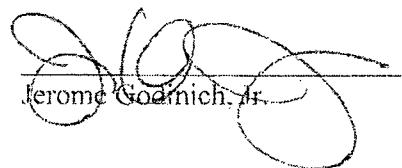
es "Appendix D"

Applicant's fourth ground

As a result of the interview, it was decided not to call Mr. Spriggs. His testimony would not help Mr. Smith. I spoke directly to Mr. Smith about these interviews.

Applicant's fifth ground

Yes, I did consider calling an expert to support Mr. Smith's account of where the victim was when she was shot. However, once we began to review the discovery and conduct our own investigation, it became apparent that the crime scene and accompanying photos did not support Mr. Smith's version of what happened. Not only did the crime scene evidence not support Mr. Smith's position that the body had been moved but also where the body had landed after having flipped over. I made a strategic decision not to consult with an expert since the expert would be reviewing the same material that I had reviewed. Since there was not physical evidence to support Mr. Smith's position, I did not see how an expert could assist the defense.



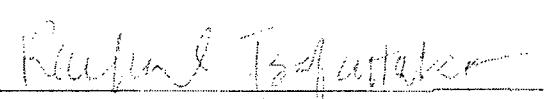
Jerome Godinich, Jr.

COUNTY OF HARRIS

STATE OF TEXAS

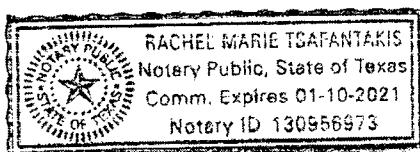
Before me, the undersigned authority, on this day personally appeared Jerome Godinich Jr., known to me to be the person whose name is subscribed to the foregoing Affidavit, and acknowledge to me that he executed the same for the purpose and consideration therein expressed. Given under my hand and seal of office:

SUBSCRIBED AND SWORN to before me on this the 28th day of June, 2018.



Rachel Marie Tsafantakis
Notary Public State of Texas

My commission expires on 1-10-21



Rachel Marie Tsafantakis
Notary's printed name

Appendix D

1 this is the first --

2 THE COURT: You've used 15 minutes.

3 MR. GODINICH: Thank you, Judge. I do
4 appreciate that.

5 So this is just the first step in what I
6 suspect the State of Texas is going to argue is a string
7 of violent conduct. I've got five minutes left. And
8 let me tell you what is also missing from this case.
9 What would have shown beyond any doubt, let alone a
10 reasonable doubt, whether or not my client was lying
11 about Christine? What would have shown it? And you-all
12 heard it. If Christine was not holding that gun, how
13 could we have found out? What did the medical examiner
14 tell you folks yesterday?

15 When Christine's body was brought to the
16 morgue, she took -- she had to look it up, but she took
17 samples from Christine's hands. Her hands were bagged
18 because they were anticipating taking gunpowder residue
19 from her hands. She put whatever tape or whatever
20 residue or whatever was on her hands in a kit. And that
21 kit sat and continues to sit in the medical examiner's
22 office not having been tested.

23 And if my client was lying about Christine
24 having that gun and him trying to wrestle that gun from
25 her, that would have shown that he was lying. Because

1 guess what? There would not have been gunpowder residue
2 on her hand, either her right or her left. But we don't
3 know that. And the burden is not on the defense to show
4 that. The State of Texas, the medical examiner's
5 office, did not test that kit for residue. And if you
6 really want to know whether or not my client was lying,
7 that kit should have been tested.

8 Now, whether or not Christine fell on the
9 left side of the bed, whether or not her body was moved,
10 that is not relevant to whether or not my client was
11 wrestling that gun from her. What he says was, she was
12 on her knees, had her hand up. And what's also
13 important about that, if you look at the autopsy report,
14 Christine was almost 6 feet tall. The pictures of that
15 bed show the bed was raised. She was on her knees. She
16 had that gun up. He was trying to reach for it. He was
17 trying to bring her hand down.

18 And Officer Martinez testified -- it's not
19 on this photograph, but a photograph similar to it --
20 that there was blood spatter residue where? Not just on
21 the bed, but on the doors. Now, how would that have
22 gotten there had not Christine been up on her knees?

23 So what do we have? We have my client
24 taking that witness stand yesterday -- and you-all --
25 like this judge said, Judge Flenniken, y'all are the

"Appendix E"

es

1 judges of the testimony given in this case. And when he
 2 took that witness stand, he talked about how -- what his
 3 relationship was with Christine and how he felt about
 4 her. And you-all can determine whether or not, when he
 5 broke down, if he was pretending, if that was some sort
 6 of an act. It didn't come across that way to me. He
 7 generally liked that woman. And there has not been any
 8 kind of a motive to establish why he would have wanted
 9 her harmed.

10 You know, we have a picture of Mr. Smith.
 11 You know, they're trying to say, you know, there he is
 12 looking wild-eyed. I think that was the testimony of
 13 Rosalind Wilson: He looked wild-eyed. His eyes looked
 14 like they could -- I can't remember exactly what she
 15 said. They looked wild, I think was the term. And
 16 there he is sweating and everything else. You know,
 17 that's really interesting because I was the only one
 18 that asked what happened to him after he was arrested.
 19

20 It's very interesting, too, Officer Cao,
 21 the officer that actually followed him, is saying he
 22 walked. The other officers: He ran, he ran. This is
 23 what they're saying in the report. The officer who
 24 arrested him, who would know better than anybody else,
 25 said he walked. But why is he sweating? Because he sat
 in a police car for what, two, three, four hours in July

1 with the windows up and then brought out so the TV
 2 cameras can see him. No wonder he looks like that. Not
 3 because he was running across the parking lot, not
 4 because he was being chased, but because by the time
 5 that photograph was taken, he had been sitting in a
 6 locked police car with the windows up. That's how he
 7 was treated by law enforcement.

8 THE COURT: You've used 20 minutes.

9 MR. GODINICH: Thank you, Your Honor.
 10 I ask you folks to find my client not
 11 guilty.

12 THE COURT: You may proceed when you're
 13 ready.

14 STATE'S CLOSING STATEMENT

15 MS. OSWALD: Thank you, Judge.

16 Essentially defense counsel's argument is
 17 based solely on what the defendant said. So if you
 18 believe all of what the defendant had to say, yeah, it's
 19 manslaughter. But the defendant's testimony carries no
 20 weight and has no credibility whatsoever.

21 And how do we know that? How do we know
 22 that he's lying or the way that he perceived things to
 23 happen that day aren't at all true and what Ms. Jacobs
 24 said occurred and what Ms. Wilson said occurred is true?
 25 You look to physical evidence. You look to the physical

1 office?

2 A. I believe they were.

3 Yes, they were. They had paper bags taped
4 around both of them, which is the common procedure for
5 people that have gunshot wounds. We tend to do that to
6 protect any evidence that might be remaining on their
7 hands.

8 Q. And did you or anyone in your lab conduct any
9 kind of testing on her hands to determine whether or not
10 there was gunshot residue?

11 A. I always collect gunshot residue, the evidence
12 kit, in every person who's shot. And I'm just
13 confirming that I sent that here. *XAFB*

14 Q. Sure.

15 A. But it may not necessarily be tested. And that
16 can occur at the request of anyone that's involved in
17 the case, investigating the case. So I did collect the
18 gunshot residue kit, but I don't have any knowledge of
19 whether or not it was then requested to be tested at a
20 later date.

21 Q. So for the purposes of this report, we don't
22 have any information as to whether or not she had
23 gunshot residue on her hands?

24 A. I don't have any information, no. I don't know
25 if it exists.

*Asked
Bout Hands*

1 MR. GODINICH: No further questions.

2 Thank you.

3 THE COURT: Anything further?

4 MS. OSWALD: Nothing further from the
5 State, Your Honor.

6 THE COURT: Any objection to this witness
7 being excused?

8 MR. GODINICH: Not from the defense, Your
9 Honor.

10 MS. OSWALD: None from the State.

11 THE COURT: Ma'am, you may step down.
12 You're free to go about your business.

13 Ladies and gentlemen, at this time you're
14 going to be given a lunch break. Please remember the
15 admonitions previously given. You may step into the
16 jury room.

17 THE BAILIFF: All rise for the jury.

18 (Lunch recess.)

19 (Open court, defendant and jury present.)

20 THE COURT: You may be seated.

21 You may call your next.

22 MS. OSWALD: Your Honor, before the State
23 calls its next witness, Mr. Godinich and I -- during the
24 break, I contacted the homicide officer, Sergeant
25 Elsbury, who e-mailed me Ms. Rosalind Wilson's -- the

("Appendix F")

1 cocaine. The second one is cocaethylene, and it's a
 2 breakdown product of cocaine and alcohol or ethanol.
 3 And then the fourth line is cocaine, which is the parent
 4 drug cocaine before it's broken down.

5 She also had ethanol, which is the alcohol
 6 that people drink in alcoholic beverages at a level of
 7 .07 grams per deciliter. And then she had
 8 phencyclidine, which is known as PCP, another type of
 9 drug.

10 Q. So she had all of those in her system at the
 11 time of her death?

12 A. Yes.

13 Q. Can you tell from those reports or in your
 14 expert opinion whenever that was ingested or taken into
 15 her body?

16 A. No, I can't.

17 Q. Would shooting an individual with a firearm in
 18 the head be an act clearly dangerous to human life?

19 A. Yes.

20 Q. In your opinion and from what you've seen, is a
 21 firearm a deadly weapon?

22 A. Yes.

23 Q. And is a firearm capable of causing death
 24 and/or serious bodily injury?

25 A. Yes.

1 MS. OSWALD: Pass the witness, Your Honor.

2 THE COURT: Any questions?

3 MR. GODINICH: Yes. Thank you, Your Honor.

4 **CROSS-EXAMINATION**

5 BY MR. GODINICH:

6 Q. Dr. Doyle, phencyclidine is -- can you tell us
 7 a little bit about that? It's illegal, obviously, but
 8 what does phencyclidine do to the system?

9 A. It's basically known as a stimulant in some
 10 cases, but to predict what an individual person's
 11 behavior is going to be -- because it can vary from
 12 person to person -- when they have phencyclidine in
 13 their system, I'm not able to do that just from knowing
 14 it's in their system.

15 Q. No, that wasn't my question. What does it do
 16 to the system, to the human body? Does it affect the
 17 brain syntax? Can you tell us what it does once it's in
 18 the system?

19 A. I'm not familiar with how it's broken down. It
 20 tends to -- it can increase people's heart rate and
 21 blood pressure, but other than that, as far as how it
 22 breaks down, I don't recall those specifics.

23 Q. Okay. Now, if I'm reading this correctly, I
 24 see that Ms. Cousins' hands -- were they bagged? Were
 25 they covered when they came to the medical examiner's

obtain an affidavit from counsel. Questioning why, did not call on eye witness to testify, why, did not get the fingerprints off the gun, and why he did not investigate the results of the residue kit. On Dec.14, 2020 the Court of Appeals denied Petitioner's appeal, based on the claim in counsel's affidavit. Counsel claimed in his affidavit that he did not investigate the exculpatory evidence because he didn't think it would help and that counsel planned to use a defense that Petitioner shot Cousin on accident, but that defense was never used, and counsel fail to call on eyewitness or get statement from the witness made to police. Petitioner failed for a(C.O.A.) and the United States Court of Appeals denied the request claiming the Petitioner failed to state A Constitutional violation. When in fact Petitioner claimed that he was denied the counsel guaranteed under the Sixth Ammendment and that the deficient performance of appointed counsel prejudiced the defense. Petitioner also claimed that the withholding of exculpatory evidence by the prosecutor denied him Due Process that's protected under the Fourteenth Ammendment. Petitioner now comes before the Supreme Court on a Writ of Certiorari claiming the Court of Appeal as ruled contrary to the rules of the United States Supreme Court when it denied the Petitioners request for a (C.O.A.).

State Habeas Court. While the State Habeas Trial Court offered multiple contradictory and even mutually exclusive theories as to why Petitioner's Brady claim lacked merit those theories not only lacked evidentiary support in the record before the State Habeas Court but were premised on A fundamental misunderstanding of Supreme Court precedent. Petitioner has shown the Court that due to the prosecutor's withholding of exculpatory evidence, Petitioner has been denied Due Process, and that the counsel's failure to investigate Petitioner was denied the counsel guaranteed under the Sixth Amendment. Therefore the Petitioner should be granted the same relief as in Avila v Quaterman where the Court ruled Petitioner is entitled to A Certificate of Appealability with regard to whether his Constitutional rights under Brady were violated at the guilt-innocent phase of his trial by the prosecution's failure to disclose the favorable opinion and personal knowledge of Dr. Wilson. Petitioner is Granted A Certificate of Appealability with regards to narrow issues: (1) Whether Petitioner's Constitutional rights under Brady where violated at the guilt-innocense phase of his trial by the prosecution's withholding of favorable opinions and personal knowledge of Dr. Wilson. (2) Whether Petitioner's trial counsel rendered ineffective assistance in connection with the punishment phase of Petitioner's capital Trial by failing to interview Dr. Wilson. For these same reasons, Petitioner should be granted this Petition. The Supreme Court has ruled in Mowbray and in Avila, that the withhold and failure to investigate the expert's report violates the Petitioner's Constitutional right.