No. 21-5897

IN THE
SUPREME COURT OF THE UNITED STATES

Shahram Shakouri, Petitioner

vs.

Bobby Lumpkin, Director,
Texas Department of Criminal Justice
Institutional Division, Respondent

On Petition For Rehearing
From Supreme Court Of The United States
December 6, 2021 Order

# PETITION FOR REHEARING PURSUANT TO RULE 44.

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On December 14, 2021, Petitioner in the above-entitled case was notified via postal system that his petition for writ of certiorari was denied on December 6, 2021. Here, he is seeking this Honorable Court's Leave to file this Petition For Rehearing.

The purpose of this petition is not to delay the disposition of this case or to impose needless hardship on the Respondent. Rather, it intends to establish by a substantial showing that the lower courts denied relief in violation of clearly established laws of this Court. This Court has long established that "the Sixth Amendment does not permit the prosecution to prove its case via ex parte out-of-court affidavits, [557 U.S. 305].

Petitioner prays that this Honorable Court will take notice of this substantial ground not previously presented, that the State violated Petitoner's right to confrontation and cross-examination under the provisions of the Sixth Amendment to the Constitution by

admitting into evidence affidavits from three new affiants "witnesses" who were not present at trial.

## QUESTIONS PRESENTED

The Texas habeas courts in this case admitted into evidence affidavits from three new witnesses in support of prosecution's argument to deny relief. The witnesses did not participate in trial, and the habeas courts denied Petitioner's motion for an evidentiary hearing. Consequently, Petitioner had no opportunity to confront, or to cross-examine the new witnesses against him.

Considering that, "the Sixth Amendment does not permit prosecution to prove its case via ex parte out-of-court affidavits," [557 U.S. 305], and in light of this Court's ruling that "a witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, the defendant had a prior opportunity for cross-examination," [541 U.S. at 54], the questions presented are:

(1) Whether admission, at habeas trial of affidavits of the new witnesses who did not testify at trial held to violate Petitioner's right under Federal Constitution's Sixth Amendment to confront witnesses against him? And

(2) Whether the new witnesses who volunteered their testimony belonged to a special category of witnesses, helpful to prosecution, but somehow immune from confrontation?

## REASONS FOR GRANTING THE PETITION

Under the Antiterroism and Effective Death Penalty Act (AEDPA), a federal court cannot grant habeas corpus relief unless the state court's decision in denying relief "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). As the Second Circuit has instructed, a "principle is clearly established Federal law for § 2254(d)(1) purposes only when it embodied in a Supreme Court holding, framed at the appropriate level of generality." Washington v. Griffin, 876 F. 3d 395 (2nd Cir. 2017).

In other words, the Supreme Court's holding does not have to be exactly on-point with the facts, as long as the general rule can equally apply to the case. Applying the above principle to the present case, the admission of out-of-court affidavits of three new witnesses, regardless of their "indicia of reliability," to the habeas court were inadmissible without an opportunity for cross-examination of the declarant.

In Crawford v. Washington, 124 S.Ct. 1354, this Court observed, "the Confrontation Clause, providing that accused has right to confront, and cross-examine witnesses against him, applies not only to in-court testimony, but also to out-of-court statements introduced at trial, regardless of admissibility of statements under law of evidence. U.S.C.A. Const. Amend. 6.

In response to Petitioner's Application for Writ of Habeas Corpus under Article 11.07, the State habeas attorney; John Rolater drafted affidavits on behalf of the Complainant and other State's

witnesses including three new witnesses who were not even present at trial, and did not testify in person.

The State and the Federal Courts denied Petitioner's motion for evidentiary hearing, necessarily, denied him an opportunity to confront, and cross-examine the new witnesses against him, or to question the State habeas attorney who drafted their affidavits.

In Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527 (2009), this Court held, "Admission, at trial of affidavits of state laboratory analysts who did not testify at trial held to violate accused's right under Federal Constitution's Sixth Amendment to confront witnesses against him, because affidavits were "testimonial."

In Washington v. Crawford, this Court held, that "the Sixth Amendment guarantees a defendant's right to confront those who bear testimony against him. A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, the defendant had a prior opportunity for cross-examination. 541 U.S. at 54, 124 S.Ct. 1354.

Turning to the present case, the out-of-court testimonies presented to the habeas courts, were affidavits, which fell within the core class of testimonial statements covered by the Confrontation Clause, and subject to reliability assessment, by testing in the crucible of cross-examination.

In Melendez-Diaz v. Massachusette, 557 U.S. 305, this Court observed, "The Confrontation Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the

crucible of cross-examination." In the case at hand, the habeas courts arbitrarily assumed because the State drafted the affidavits, and because Petitioner has been found guilty the State's new witnesses' affidavits must be reliable. On this issue, this Court in **Melendez-Diaz** held, "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes."

Notably, this Court in **Melendez-Diaz**, supra observed, "There is no support for the proposition that witnesses who testify regarding facts other that those observed at the crime scene are exempt from confrontation. The absence of interrogation is irrelevant; a witness who volunteers his testimony is no less witness for Sixth Amendment purposes."

Moreover, this Court held, "The text of the [Sixth] Amendment contemplates two classes of witnesses--those against the defendant and those in his favor. The prosecution must produce the former, and the defendant may call the latter. There is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation. [557 U.S. 305]. See also **Garlick v. Lee**, 1 F. 4th 122 (2d Cir. 2021). Accordingly, any argument from the Respondent that said affiants were exempt from confrontation or cross-examination is mute.

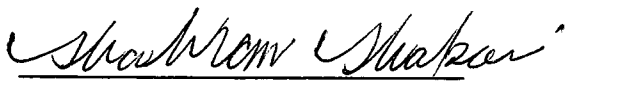
## CONCLUSION

In light of the foregoing U.S. Supreme Court case laws, and considering that "the Confrontation Clause imposes a burden on the prosecution to present its witness into the Court," [557 U.S. 305], the

State of Texas violated Petitioner's Sixth Amendment rights as admission of out-of-court affidavits with no opportunity for confrontation and cross-examination of affiants, was an unreasonable application of clearly established Supreme Court precedents.

Petitioner, thus, is entitled to relief.

Respectfully Submitted,



Shahram Shakouri
Date: December 22, 2021

Footnote:

1. In response to the State's answer to his writ of habeas corpus, Petitioner objected to the State's posttrial affiants' testimonies, including to the affidavits submitted to the habeas court from Officer Sam Owens; Assistant District Attorney Christopher Fredricks, and Deanna Tabb. See Exhibit "L" attached to Petitioner's writ of certiorari at 9, 10, and 18 respectively. As mentioned before, none of the above affiants testified at trial.