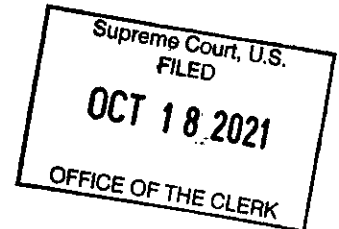


21-6088

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



George Brass — PETITIONER
(Your Name)

vs.

Brian Williams, et al. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Ninth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

George Brass #1045449
(Your Name)

High Desert State Prison / P.O. Box 650
(Address)

Indian Springs, NV 89070
(City, State, Zip Code)

(702) 879-6789
(Phone Number)

QUESTION(S) PRESENTED

1. whether reasonable jurists would find the rulings as to the issues related to the revolvers debatable or wrong?
2. whether reasonable jurists would find the rulings as to the systematic exclusion of African Americans from the venire debatable or wrong?
3. whether reasonable jurists would find the rulings as to the withdrawal of plea and related issues debatable or wrong?
4. whether reasonable jurists would find the rulings as to the jury instructions in Brass's case, as well as the effect of Ramos v Louisiana debatable or wrong?

LIST OF PARTIES

- [] All parties appear in the caption of the case on the cover page.
- [X] 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:

Brian Williams, SR.;
Attorney General for the State of Nevada.

RELATED CASES

United States Court of Appeals for the Ninth Circuit No. 20-16004
United States District Court for the District of Nevada (Las Vegas)
No. 2:13-cv-02020-GMN-VCF

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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.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals 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☒ is unpublished.

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☒ is unpublished.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 December 14, 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: JUNE 30, 2021, 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).

☐ 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

whether Brass's underlying 28 U.S.C. § 2254 habeas petition shows that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling," under Slack in McDaniel, 529 U.S. 473, 484 (2000); 28 U.S.C. § 2253(c)(2); Gonzalez v. Thaler, 565 U.S. 134, 140-141 (2012); and Miller-El v. Cockrell, 537 U.S. 322, 327 (2003).

STATEMENT OF THE CASE

A. Procedural Summary

On November 6, 2006, the State charged Brass, along with three co-defendants, in Case C227661, with Murder with Use of a Deadly Weapon, Attempt Murder with Use of a Deadly Weapon, Conspiracy to Commit Robbery, Robbery with Use of a Deadly Weapon, and Attempt Robbery with Use of a Deadly Weapon ("September 22, 2006 incident"). ECF No. 26-1. On April 17, 2009, the State charged Brass, along with two co-defendants, in case C253756, with Conspiracy to Commit Robbery, Attempt Robbery with Use of a Deadly Weapon, Attempt Murder with Use of a Deadly Weapon, and Murder with Use of a Deadly Weapon ("September 15, 2006 incident"). ECF No. 31-4.

On April 24, 2009, the State filed a motion to join the two cases, and Brass opposed the motion to join. ECF No. 31-6. The district court granted the State's motion and entered its order consolidating the cases on June 15, 2009. ECF Nos. 32-2 and 32-3. An Amended Information reflecting the consolidation was filed on June 11, 2009 charging Brass with Conspiracy to Commit Robbery ("Counts 1 and 11"), Attempt Robbery with Use of a Deadly Weapon ("Counts 2, 6, 13, and 14"), Attempt Murder with Use of a Deadly Weapon ("Counts 3, 5, 9 and 10"), Robbery with Use of a Deadly Weapon ("Count 4 and 12"), and Murder with Use of a Deadly Weapon ("Counts 7 and 8"). ECF No. 32-1.

B. Background Facts and Jury Trial

Brass' conviction stemmed from offenses committed on September 15, 2006, and September 22, 2006. ECF No. 35-4 at 4-5. On September 15, 2006, three men ("Group 1") were standing in a small business complex when a witness saw three other men ("Group 2") approach from between two buildings. *Id.* at 5:1-4. Two of the approaching men in Group 2 drew firearms and demanded money from Group 1. *Id.* at 5:6-7. One man in Group 1 was shot several times and killed from the attack by Group 2. *Id.* at 5:10-13. Group 2 then ran back towards the gap between the buildings. *Id.* A witness present at the scene identified one of the assailants in Group 2 as having the height, skin tone, and hair braids similar to that

1 of Brass' height, skin tone, and hair braids. ECF No. 35-5 at 3:9-10. Fingerprints lifted from the gate
2 between the two buildings matched Brass' fingerprints. ECF No. 35-4 at 5:19-20. All of the casings and
3 bullets recovered from the scene were linked to a semiautomatic handgun linked to one of Brass' co-
4 defendants, Eugene Nunnery. *Id.* at 3:12-13.

5 One week later, on September 22, 2006, in an apartment complex near the first attack, Brass and
6 three other assailants ("Group 3") approached another group of males ("Group 4") in the parking lot with
7 weapons and demanded money. *Id.* at 3:20-21. Group 3, including Brass, began firing their weapons,
8 killing one of the men in Group 4. *Id.* at 3:23-25. Bullets recovered from the scene were determined to
9 be from a .9mm linked to Eugene Nunnery, a .45 caliber gun, and a bullet of medium caliber which is
10 consistent with a .38, .40, .357, or a .9 mm. *Id.* at 3:26-28, 4:1-2. Brass' cell phone was also recovered
11 from the scene. *Id.* A search of Brass' parents' home recovered a .38 caliber revolver, several live rounds,
12 and clothing similar to that described by witnesses to both robberies. *Id.* at 4:4-7. Brass admitted to being
13 present at the scene and to being acquainted with Mr. Nunnery. ECF No. 35-4 at 6:24-26.

14 Brass' jury trial began on October 14, 2009, and lasted approximately five days. ECF No. 35-5 at
15 2:11. On October 20, 2009 a jury found Brass not guilty on Counts 1 through 7 (all charges related to the
16 September 15, 2006 incident) and guilty of Counts 8-14 (all charges related to the September 22, 2006
17 incident). *Id.* at 2:12-13.

18 **C. Direct Appeal and Post-Conviction Proceedings**

19 Brass appealed his judgment of conviction. ECF No. 35. On December 10, 2010, the Nevada
20 Supreme Court affirmed the conviction and sentence. ECF No. 36-1. Remittitur issued on January 4,
21 2011. ECF No. 36-2.

22 On April 5, 2011, Brass filed a proper person state habeas petition in the state district court. ECF
23 No. 36-4. Counsel filed a supplemental petition. ECF No. 38-3. Following an evidentiary hearing, the
24 court denied the petition. ECF Nos. 39; 39-1. Brass appealed. ECF No. 39-2. The Nevada Court of
25 Appeals affirmed the district court's decision. ECF No. 40-2. Remittitur issued on October 29, 2013.
26 ECF No. 40-3.

27 On October 29, 2013, Brass handed his proper person federal habeas petition to a correctional
28 officer for filing with this Court. ECF No. 7. Counsel filed the Amended Petition on December 17, 2014.

ECF No. 24. On March 17, 2015, Respondents filed a renewed motion to dismiss the Amended Petition.
ECF No. 47.

On September 18, 2015, Brass filed a successive petition for writ of habeas corpus with the state district court. ECF No. 73-1. The district court denied the petition as procedurally barred pursuant to NRS 34.726 and NRS 34.810. ECF No. 73-3. Brass appealed and the Nevada Court of Appeals affirmed the district court's decision. ECF Nos. 73-4; 73-5.

On February 2, 2018, Respondents filed a renewed motion to dismiss the Amended Petition. ECF No. 72. On May 24, 2018, the Court granted, in part, and denied in part, the renewed motion to dismiss. ECF No. 84. The Court dismissed Grounds Four and Nine. *Id.*

On May 1, 2020 the U.S. District Court filed its Order denying Brass's 2254 petition and also denied any COA. See, Appendix B.

On May 26, 2020 Brass, through counsel, filed for a COA with the 9th Cir Court of Appeals.

On December 14, 2020 the COA request was denied. See, Appendix A.

Brass's appointed counsel withdrew and secured a continuance of the deadline to file for reconsideration in Mo Se:

Brass requested and was granted a further continuance due to Covid-19 restrictions and his medical condition.

On June 8, 2021 Brass filed a Motion for Reconsideration.

On June 30, 2021 Brass's motion was denied. See Appendix C.

REASONS FOR GRANTING THE PETITION

Brass can show that the rulings of the U.S. District Court and Court of Appeals denying him a certificate of appealability were contrary to, and an unreasonable application of Slack v. McDowell, 529 U.S. 473, 484 (2000), as well as 28 USC § 2253(c)(2); Gonzalez v. Thaler, 565 U.S. 134, 140-141 (2012); Miller-El v. Cockrell, 537 U.S. 322, 327 (2003), based upon the following:

1. Reasonable jurist would find the lower courts rulings (the U.S. Dist. Ct. and 9th Cir. Court of Appeals, hereinafter "lower courts") as to the issues related to the revolver debatable or wrong.

Brass was convicted of murder with the use of a deadly weapon, attempted murder with the use, conspiracy, and robbery charges (attempted and with the use) and sentenced to two consecutive life terms. This was based upon the state alleging "four African American men, each with a handgun... firing their weapons" resulted in the death of a Mexican man, Saul Nunez-Suastegui.

What the lower courts failed to do, and Brass's appointed counsel failed to do in the Petition on Brass's behalf for a Certificate of Appealability, was to link all of the related 2254 grounds and issues as to the revolver.

The district court admitted the revolver "was not linked to the physical evidence recovered from the crime scene" and "nothing connecting Brass to the revolver..." yet found it's admission "not fundamentally unfair" as "Brass was potentially one of the four armed individuals because he had access to a handgun," See, Appendix B, at 9, and witness testimony of three people. Id.

1 The problem with this analysis is that it is debatable and wrong as it ignores
2 the interplay with the unavailable witnesses [Grand 3] Id at pp 13-16;
3 the dispute over the mere presence and conspiracy jury instructions [Grand
4 5] Id. at pp. 16-19; the ineffectiveness of trial counsel to investigate to refute the
5 revolver's involvement in the alleged incident [Grand 6 fragments, ownership] Id at
6 pp 22-23. [See, also choice to testify at pp 41-45] and the cumulative effect.

7 What a Certificate of Appealability was requested covers whether the cumulative
8 effect of unavailability of witnesses, the ineffective assistance of counsel as to the
9 issues of gun testing, ownership, client testimony and jury instructions in fact
10 meets the fundamentally unfair standard set forth but not applied to Brass's
11 case by the district court. Id. at p. 9.

12 It is debatable whether the results of the trial would have been different
13 if these mistakes did not influence the case presented to the jury. Evidence
14 that contradicted or undermined the State's case with evidence versus
15 argument or inference was available but not utilized by Brass's counsel.

16 Here, proper testing and testimony that the physical evidence could not
17 support the revolver as being used in the crime would impeach the state's
18 witnesses, but more importantly destroy the potentiality that Brass was "one
19 of the four armed individuals" as relied upon by the district court. Id. at p. 9,

20 Put another way, "access to a handgun" [Id. at p. 9] instead of access
21 to a handgun used in the crime, or linked to it by recovered bullet fragments,
22 fingerprints, or any forensic evidence, is, and was, not enough to make
23 its admission not a violation of Brass's due process rights. Combine this
24 with the Crawford confrontation issues of Grand 3, the Strickland issues of
25 pre-trial, trial, appeal and post-conviction failures and ineffectiveness, as to
26 the revolver, witnesses, and jury instructions, as well as instructional errors,
27 and Brass should be allowed the opportunity to further brief and
28 litigate through the requested Certificate of Appealability.

2. Reasonable Jurists would find the district court's rulings as to the systematic exclusion of African Americans from the venire wrong.

Brass contends the issue of systemic racism was denied at all levels due to the failures of his counsel to properly present the issue. The Nevada Supreme Court noted "appellant neither made any argument nor presented any evidence African Americans were systematically excluded from the venire." ECF No. 40-2 at 5. The federal district court, quoting the U.S. Supreme Court's decision in *Duren*, and other courts' decision in *Randolph v. California*, "[a] showing that a jury venire underrepresents an identifiable group is, without more, an insufficient showing of systematic exclusion." ECF No. 101 at 30, denied Brass relief on this ground and was wrong to do so.

Brass was appointed counsel, at all levels, trial, appeal, state and federal habeas (and habeas appeal) that were not themselves African American like Brass. They either failed to investigate, object (at trial), or in subsequent reviews take the time to gather the facts, witnesses, documents, and other evidence, or present arguments to support the systemic racism and exclusion of African Americans from the venire. Thus the issue was never presented on the merits.

According to the 2019 World Almanac and Book of Facts, Las Vegas, NV has a population of 641,676 (28) and a racial distribution of "11.8 % black," at page 599. As the Black Lives Matter movement, and the attention given to the matters of race since the death of George Floyd, and others, have shown, systemic racism not only exists, but often needs the type of resources not utilized on Brass's behalf to uncover and present for proper review and consideration.

Here reasonable jurists would disagree or find the district court's findings as to systemic racism and exclusion of African Americans wrong as it was based on anecdotal evidence of "two African Americans in the venire" and not by counsel knowledgeable or qualified to present the issues properly.

1 Therefore, this Court is asked to ~~grant~~ a Certificate of Appealability ~~that is~~
2 to allow Brass to fully brief that the facts, evidence, and arguments exist to
3 demonstrate with the systematic exclusion of blacks from juries in Clark
4 County is a product of systemic racism entitling him to federal habeas relief.
5

6 3. Reasonable Jurists would disagree or find wrong the district
7 court's ruling as to the withdrawal of plea related issues
8

9 Brass requested a certificate of appealability as to the issues that
10 relate to the withdrawal of his plea. Here, the district court denied
11 the issue but through the misapplication of facts and overlooking
12 applicable caselaw and related issues.

13 Specifically, Brass contends the issue of withdrawing the plea on the
14 advice of counsel is in fact contested, which despite being in the lower court
15 proceedings, was overlooked by the district court and by the 9th Cir Court of Appeals

16 Once the door is opened to the withdrawal being initiated by counsel,
17 then Brass believes an examination of the issues of his trial counsel's
18 ineffectiveness comes into play. As set forth in issues 1 and 2, supra,
19 trial counsel was not prepared to adequately and effectively defend Brass,
20 who if informed of failure to address the revoker issues, would not have
21 sought to withdraw his plea, or proceed to trial with an improper venue.

22 Similarly, Brass also contends jurist would disagree or find wrong
23 the refusal to apply the *Lafayette v. Cooper* and *Missouri v. Frye* decisions
24 BCF No. 101 at p. 45, footnote 1. by the district court to plea negotiations,
25 in Brass's case.

26 The fact the ~~lower~~ court is overlooked was why did Brass seek
27 to withdraw his plea? Also, did it create a conflict to order Brass's
28 attorney at the trial stage to "file a brief on Brass's behalf"

1 who allegedly "did not want Brass to withdraw his guilty plea." Id. at p. 44,
2 lines 5-7, 9-11. Wait, what? The trial counsel was ordered to argue against
3 his own advice and opinion as to the withdrawal, and those contrary
4 positions did not mandate new counsel, and, worse, now serves as a
5 basis to deny relief at the federal level?

6 Therefore, Brass contends both reasonable jurists and this court
7 would agree that the factual basis used to deny Brass relief
8 on the withdrawal of plea issues entitles him to a certificate
9 of appealability to further and fully present this issue.

10
11 4. Reasonable jurist would disagree or find wrong the district
12 courts rulings as to the jury instructions in Brass' case as
13 well as the effect of Ramos v. Louisiana

14
15 In addition to the jury instruction issues raised in Grand 1, Supra,
16 Brass contends he is entitled to reconsideration as to the effect of
17 Ramos v. Louisiana, 140 S.Ct. 1390 (2020) on jury instruction No. 12 in
18 his case which allowed Brass's jury to "not have to agree on the theory
19 of guilt or the principle of criminal liability."

20 Whether Ramos will effect this, or other aspects of Brass's case,
21 such as retroactive application to his case is both pending review
22 in Edwards v. Unumway, S.Ct. Case No. 19-5807, was a question left
23 open in the Ramos decision itself

24 whether the right to jury unanimity applies to cases on collateral
25 review is a question for a future case where the parties will have
26 a chance to brief the issue and will benefit from their adversarial
27 presentation.

28 Id. at 1407.

• Unlike the petition for a COA filed by counsel, Brass believes the holding in Ramos allows for a challenge to the state not having to prove theory unanimously, which in Brass's case was prejudicial in light of the facts and circumstances raised in Grand 1, supra.

A certificate of appealability should have been granted to allow Brass to make his arguments under Ramos as to retroactivity and application to his case.

As for all four of the above issues that were denied by the lower courts, Brass contends the refusal to grant a certificate of appealability, at the district court and court of appeals, was, and is, an unreasonable application of Stacy v. McDaniel, 28 USC § 2253(c)(2), Gonzalez v. Thaler, and Miller-El v. Cockrell, such that relief from this Honorable Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

George Brass
George Brass # 1045449

Date: 10/16/2021