No. 21-7029

IN THE

SUPREME COURT OF THE UNITED STATES



David Pedder
(Your Name) — PETITIONER

vs.

BOBBY LUMPKIN, Director, TDCJ-CID — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

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## QUESTION(S) PRESENTED

QUESTION No. 1: Whether a federal habeas petitioner is deprived of his constitutional rights to Due Process as implicated by the 14TH Amendment to the United States Constitution to meaningful appellate review when a federal appellate court fails to consider and address the issue or issues upon which a certificate of appealability was granted?

(A).

The Petitioner was deprived of his constitutional rights to Due Process under the 14TH Amendment to the United States Constitution because the Panel of the United States Court of Appeals for the Fifth Circuit fail to consider and address the issues upon which the certificate of appealability (COA) was granted.

QUESTION No. 2: Whether the Substantial Availability Test announced by the United States Court of Appeals for the Fifth Circuit in Moore v. Quaterman, 534 F.3d 454 (5th Cir. 2008) deviates from or is contrary to the Court's consensus in Schulp v. Delo, 115 S.Ct. 851 (1995), McQuiggin v. Perkins, 133 S.Ct. 1924 (2014) and the panel decision in Bosley v. Cain, 409 F.3d 657 (5th Cir. 2005) holding that an actual innocence claim requires a habeas petitioner to support his allegation of constitutional error with new reliable evidence, whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence, that was not presentedlat trial for exclusion, or unavailability, or available and not presented at trial?

(A).

The court of appeals erred by holding that the information relied upon by the Petitioner was not newly discovered evidence or new evidence because it was in reach of the Petitioner, when such information had been withheld by the State in violation of Brady v. Maryland, 83 S.Ct. 1194 (1963) as to overcome the 1-year limitation period, as such evidence was not presented at trial.

## 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: Ken Paxton, Attorney General, State of Texas, P.O. Box 12548, Austin, Texas, 78711-2548.

## 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.

## 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 July 08, 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

United States Constitution, 14TH Amendment, 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 within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

From a federal habeas corpus proceeding under Title 28 U.S.C., Section 2254 et seq. in No. #1:16-CV-203, Styled: David Pedder v. Director, TDCJ-CID, before the United States District Court for the Eastern District of Texas, Beaumont Division, the district court delivered a Memorandum Order overruling the Petitioner's objections and adopting the Report and Recommendation of an United States Magistrate Judge dismissing the petition as time-barred under the provisions of Title 28 U.S.C., Section 2244(d). (Appendix B).

In adopting the Recommendation and Report of the Magistrate Judge, the district court held that the Magistrate Judge determined that the evidence relied upon by the Petitioner was not new as it was clearly substantially available at the time of trial, and in addition, the Magistrate Judge found the evidence put forth in the form of sixteen new affidavits were merely cumulative of the testimony put forth by Mr. Freeman who testified at trial.

In summerizing the case, the Magistrate Judge held that while the purported new evidence may have blostered the testimony of Mr. Freeman, it could not find that it was more likely than not that no reasonable juror would have convicted the Petitioner in light of the new evidence. (Appendix B; p. 2). The district furthered the conclusion, that at best, the Petitioner's new evidence shows that a reasonable doubt could have been found to exist; it failed, however, to satisfy the burden of showing that no reasonable juror would have found him guilty, thus, the Petitioner failed to meet his burden under the holdings of McQuiggin

v. Perkins, 133 S.Ct. 1924 (2013).

The district court in it's summationdid not address the Petitioner's claim under Brady v. Maryland, 83 S.Ct. 1194 (1963) that the newly discovered evidence was within possession of the prosecution and had been withheld in it's application of the "Substantial Available Test."

The Petitioner gave a timely notice of appeal to the United States Court of Appeals for the Fifth Circuit and Application for A Certificate of Appealability. On March 24, 2020 a Circuit Judge entered an Order granting the Petitioner a certificate of appealability in No. #19-40091, Styled: David Pedder v. Lorie Davis, Director, Texas Department of Criminal Justice-Correctional Institutions Division.(Appendix C).

In granting a certificate of appealability, the Circuit Judge held that the Petitioner had raised a facially valid constitutional claims in arguing that the State violated Brady and that his counsel rendered ineffective assistance. Brady v. Maryland, 83 S.Ct. 1194 (1963) and Strickland v. Washington, 104 S.Ct. 2052 (1984), and upon the issues of whether (1) for the purposes of the actual-innocence gateway of McQuiggin v. Perkins, 133 S.Ct. 1924 (2013), new evidence must be newly discovered, previously unavailable evidence or if it includes reliable evidence but notpresented at trial, see Hancock v. Davis, 906 F.3d 387 (5th Cir. 2018), cert. denied, 139 S.Ct. 2714 (2019); (2) the evidence qualified as new; and, if so, (3) whether the evidence is cumulative and whether in light of "all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily

be admitted under rules of admissibility that would govern at trial, it is more likely than not that no reasonable juror would have found the Petitioner guilty. (Appendix C).

After Briefing and submission, a Panel of the Fifth Circuit held that the Petitioner appeals from the time-bar dismissal of his 28 U.S.C. § 2254 petition, wherein he raised, inter alia, a claim that his trial counsel rendered ineffective assistance. The Panel did not note the Petitioner's Brady claim. (Appendix A; p. 1). The Panel held that the information contained in the diagram, photographs, and affidavits was within reach of the Petitioner's personal knowledge and reasonable investigation, particularly given his working or family relationships with certain affiants and that he remained employed at the business for the nearly two years that it took his case to go to trial. The Panel did not a consider and address the issues upon which the certificate of appealability was granted, and merely employed the "Substantial Available Test," as announced by another panel in Moore v. Quarterman, 534 F.3d 454 (5th Cir. 2008), and without reference to the Petitioner's Brady claim that the information had been withheld by the prosecution.

The Panel concluded that the Petitioner failed to support his actual innocence gateway claim with new reliable evidence in affirming the judgment of the district court. (Appendix A; p. 3).

## REASONS FOR GRANTING THE PETITION

The Petitioner is mindful of the directive accorded Rule 10 of the Supreme Court Rules, that a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law, and will be granted only for compelling reasons.

QEUSTION No. 1

Whether a federal habeas petitioner is deprived of his constitutional rights to Due Process as implicated by the 14TH Amendment to the United States Constitution to meaningful appellate review when a federal appellate court fails to consider and address the issue or issues upon which a certificate of appealability was granted?

A.

The Petitioner was deprived of his constitutional rights to Due Process under the 14TH Amendment to the United States Constitution because the Panel of the United States Court of Appeals for the Fifth Circuit fail to consider and address the issues upon which the certificate of appealability (COA) was granted.

This Court has long established that the requirements of the Due Process Clause of the 14TH Amendment to the United States Constitution assures an individual to notice and opprotunity to be heard that enjoins the right to present evidence and have judicial findings based on that evidence. See., Fuentes v. Shevin, 92 S.Ct. 1983 (1972). Federal law is explicit on this matter, as a COA is a jurisdictional prerequisite, and until a COA has been issued a federal appellate court lacks jurisdiction to rule on the merits of the appeal from a habeas petitioner. See., Miller-El vv Cockrell, 123 S.Ct. 1029 (2003). A federal court of appeals is limited to review only those issues upon which a COA has issued.

On a case in point, the Court of Appeals for the Eleventh Circuit held, that under the court's supervisory power, that the district courts in that Circuit must address all claims presented in a habeas petition regardless of whether relief is granted or denied. See., also Rose v. Lundy, 102 S.Ct. 1198 (1982). The Court of Appeals for the Fifth Circuit has held the same. See., Galtieri v. Wainwright, 582 F.2d 348 (5th Cir. 1978, en banc). The Clisby court held that the havoc a district court's failure to address all claims in a habeas petition may wreak in the federal and State court systems comples them to require all district court to address all such claims. Accofdingly, the Court of Appeals for the Eleventh Circuit will vacate the district court's judgment without prejudice and remand the case for consideration of all remaining claims whenever the district court has not resolved all such claims. Id.

Given the Petitioner's pro se status and the avaialable resources provided, via Prison Law Library, the Petitioner cannot find any consensus handed down by this Court explicitly mandating that a court of appeals must and is obligated to eonsider and specifically address those issues upon which a COA was granted.

In this case, the Circuit Judge issued a COA on three (3) issues (1) whether for the purpose of the actual-innocence gateway of McQuiggin new evidence must be newly discovered, previously unavailable evidence or if it includes reliable evidence that was available but not presented at trial, (2) whether the Petitioner's evidence qualified as new, and, if so, (3)swhether the evidence is cumulative and whether in light of all the evidence, old and

new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial, it is more likely than not that no reasonable juror would have found the Petitioner guilty. (Appendix C). These issues were ordered briefed by the parties. The Panel did not consider and address the issues upon which the COA was granted, that clearly deprived the Applicant of the right to be heard and have judicial findings based on his argument. Instead the Panel eluded the issues upon which the COA was granted in their entirety relying on the fact that this Court has not yet defined the phrase for purposes of actual innocence claims, and that, that court had not decided whether it requires "newly discovered, previously unavailable evidence, or, instead, evidence that was available but not presented at trial, thus, declining to consider and address the issues upon which the COA was granted. (Appendix A; p. 2). However, on this matter, this Court has defined the meaning of "new evidence" as exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence that was not presented at trial. See., McQuiggin, and Schlup v. Delo, 115 S.Ct. 851 (1995). Another panel of the Fifth Circuit has held the same. See./ Bosley v. Cain, 409 F.3d 657 (5th Cir. 2005) and opposite to the panel decision in Hancock.

It is the Petitioner argument that he was deprived of his rights to Due Process under the 14TH Amendment to the United States Constitution because the Panel of the court of appeals fail to consider and address the issues upon which the COA was issued.

It is for this reason that review should be granted under Rule 10(c) of the Supreme Court Rules because the issue of whether a court of appeals is required to consider and address those issues upon which a COA has been granted presents an important question of federal that has not been, but should be settled by this Court.

Notwithstanding, this Court should grant review to determine whether the Petitioner's constitutional rights to Due Process were violated because the Panel fail to consider and address the issues upon which the COA was granted, and if so, under Rule 10(a) of the Supreme Court Rules grant review as to call for this Court's supervisory power and remand the case to the Panel to consider and address the issues upon which the COA was granted.

As a product of the "Substantial Available Test" employed by both the district court and the Panel, such an application of law is contrary to this Court's holdings in Schulp and McQuiggin that the new reliable evidence be such that was not presented at trial, whether it be evidence that was available or unavailable.

QUESTION No. 2

Whether the Substantial Availability Test announced by United States Court of Appeals for the Fifth Circuit in Moore v. Quarterman, 534 F.3d 454 (5th Cir. 2008) deviates from or is contrary to the Court's consensus in Schulp v. Delo, 115 S.Ct. 851 (1995), McQuiggin v. Perkins, 133 S.Ct. 1924 (2014) and the panel decision in Bosley v. Cain, 409 F.3d 657 (5th Cir. 2005) holding that an actual innocence claim requires a habeas petitioner to suport his allegation of consitutional error with new reliable evidence, whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence, that was not presented trial for exclusion, or unavailability, or available and not presented at trial?

A.

The Petitioner argues that under Moore, the Fifth Circuit

has refined or sharpended a general principle of law of this Court, and/or has sharply deviated from the consensus of this Court as set out in McQuiggin, and Schulp; and is contrary or in conflict with another panel decision of the Fifth Circuit in Bosley, wherein it has been explicitly held that to proceed through the McQuiggin or the Schlup gateway, a habeas petitioner must present a "credible" claim of actual innocence, that requires the habeas petitioner to support his allegations of consitutional error with new reliable evidence, whether it be exculpatory scientific evidence, trustworth eyewitness accounts, or critical physical evidence that was not presented at trial. It is this conception that brings about that the evidence is new if it was not presented at trial regardless of whether it was availabe and withing the defense's knowledge at the time of trial. As long as the evidence was not presented at trial then it suffice as "new evidence."

It is clear that evidence is new when it has been withheld by the prosecution and the defendant was never aware of the information being withheld by the prosecution. See., Brady v. Maryland, 83 S.Ct. 1194 (1963).

It is the Fifth Circuit's standing that evidence does not qualify as "new evidence" under Schulp or McQuiggin under the actual innocence standard, if it was always within reach of the [habeas petitioner's] personal knowledge or reasonable investigation. See., Moore. However, the use of reasonable investigation would be attributed to ineffective assistance of counsel under Strickland v. Washington, 104 S.Ct. 2052 (1984).

This Court did not hold in Schulp or McQuiggin that for the

purpose an actual innocence claim, that evidence is not new if it was always within reach of the habeas petitioner's personal knowledge or reasonalbe investigation implicitly or explicitly, and explicitly held that evidence is new if it was not presented at trial... Thus, the Fifth Circuit has deviated sharply for the consensus of this Court and has refined and sharpended a general pricinple of law of this Court.

The Panel of the Fifth Circuit in this case, held that in support of the Petitioner's actual innocence claim, the Petitioner relied on numerous affidavits as well as a diagram and photographs of the business where the complainant testified the assault occurred, and that the information contained in the diagram, photographs, and affidavits were within reach of the Petitioner's personal knowledge and reasonable investigation. However, the Panel did not address the Petitioner's Brady claim in regards to the diagram, photographs and affidavits being contents and information thereof in possession of the prosecution that was withheld from the defense.

The issue surrounding the Petitioner's Brady claim had a significant bearing on the issue of whether the information was in reach of the Petitioner's personal knowledge, given the matter that it had been withheld by the prosecution. Of course, had a determination be made that the information had not been withheld by the prosecution, then naturally the Petitioner had knowledge of the information, however, this not forego the matter of whether the information is not new evidence, when such evidence had not been presented at trial...

Further, as to the first conclusion, that the contents of

of the affidavits were substantially available at the time of trial, the district court and Panel of the Fifth Circuit conflates "existence" with "availability." Anyone who practice Criminal Law knows that "physical evidence" and the "observation of witnesses" are cemented at or around the time of the alleged crime. "Unavailability," therefore, stems primarily from shodely police work, State suppression, or ineffective ness of counsel. As in this case, if trial counsel does not visit the crime scene, review the discovery, interview potential witnesses, or perform any sort of pre-trial investigation the notion of "substantially available" evidence is meaningless. This does not exclude the exclusion of the evidence because it has been withheld by the State.

Mooreover, though, the district court and Panel of the Fifth Circuit application of a "substantially available test" undercuts clearly established federal law that new evidence may take the form of "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence," that was not presented at trial." With exception of new scientific testing that does not exist at the time of trial, each of those forms of evidence would necessarily be "substantially available" assuming the State complies with the requirements under Brady, and trial counsel conducts a thorough, adequate, proper, and reasonable investigation.

It is to note that neither the district court or the Panel of the Fifth Circuit hold that the information did not meet the requirements of Brady material, as under it's findings it is clear that the information would have had an impact on the jury's verdict and the outcome of the Petitioner's trial under Brady.

Further, this Court should take a look at it's terminology in the use of "new evidence" versus "newly discovered evidence," or "newly available evidence."

It is clear that "newly available evidence," has a different contestual meaning than "newly discovered evidence," and "new discovered evidence," being that newly available evidence is simply that evidence which was exclused at trial, or simply was available but not presented at trial, whereas newly discovered evidence is such evidence that was not clearly known to the defendant as a result of suppression by the State or shady police investigative work. In contrast to " new evidence," which is simply evidence put forth by the defendant that reasonably calls into question the confidence of the defendnat's trial.

In this case, although the district court alluded that the "information" acquired by the Petitioner did not constitute new evidence, but reflected information that was available and already presented to the jury under cuts the Petitioner's Brady claim that the information he now possess was withheld from him by the State, states a value of facts that he had no knowledge of what the witnesses would have testified to. In view of the Brady violation and the additional information a reasonable juror would not have voted to convict the Petitioner, and given the Brady violation, a "court" cannot have confidence in the out come of the Petitioner's trial. It must be noted and reminded, that thee Petitioner's claim of "actual innocence" is upon his Brady claiml wherein the information was evidence withheld by the State. Thus, the evidence could not have been within reach of the Petitioner

and it would be absurd to hold that the Petitioner had knowledge of the evidence at the time of trial that was in possession of the State. The information for that matter should be viewed under the Brady standard of review in reaching whether he may pass to have the Brady claim heard on the merits, because under the Brady the evidence could not only be evidence of innocence, but also impeachment evidence.

(1)

The Petitioner argues that under Schulp, McQuiggin and Bosley, the information suffice as "newly available evidence" because it was not presented at trial and was evidence that was withheld by the State. In view of the decision announced in Majoy v. Roe, 296 F.3d 770 (9th Cir. 2002), a "court" cannot have confidence in the outcome of the Petitioner's trial, and thus, the information was sufficient to overcome the 1-year limitation period. Therefore, the Panel of the court of appeals for the Fifth Circuit erred by holding that the information did not overvome the 1-year limitation period in view of the Petitioner's Brady claim. The decision of the court of appeals should in all be vacated and remanded.

(2)

The Petitioner argues that in light of Rule 10(c) of the Supreme Court Rules, this issue presents an important question of federal law that has not been, but should be settled by this Court, notwithstanding, that the panel decision of the Fifth Circuit in Moore is in conflict with the decision of this Court in Schulp, McQuiggin, and as provided by Rule 10(b) is in conflict with the panel decision in Bousley.

This Court should grant review for the purpose of settling whether evidence is "new evidence" for the purpose of an actual-innocence claim under Schulp and McQuiggin, as long as the evidence was not presented at trial. See., also Bousley, and whether such is appropriate when viwed upon a Brady claim where evidence would have affected the outcome of the trial. The Court should also determine whether the decision under Moore deviates from this Court's decision in Schulp and McQuiggin; and resolve the Circuit panel decision split.

CONCLUSION

Given the Petitioner's pro se status, the Petitioner requests that this Court grant him the relief to which he may be entitled by this Petition in equity or at law, or any relief that the Court deems appropriate in this case.

Fortthe reasons settforth above and as demonstrated, the petition for a writ of certiorari should in all be granted.

Accordingly Written,

/s/ David Clifford Pedder Jr.

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Petitioner, In propria persona.

Date: November 26, 2021.