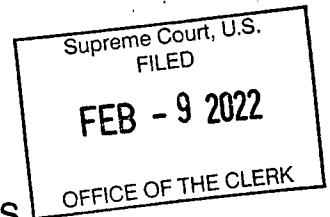


No. 21-7126 **ORIGINAL**

IN THE
SUPREME COURT OF THE UNITED STATES



Quincy Deshan Butler — PETITIONER
(Your Name)

vs.

BOBBY LUMPKIN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FIFTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Quincy Deshan Butler
(Your Name)

2665 Prison Rd 1
(Address)

Love Lady, Texas 75851
(City, State, Zip Code)

936-636-7321
(Phone Number)

QUESTION(S) PRESENTED

- 1). Whether Certificate of Appealability should have been granted?
- 2). Whether due process was violated when counsel failed to request lesser included instructions?
- 3). Whether due process was violated when trial counsel fails to object to remarks of murderer at heart during death conduct trial?
- 4). Whether counsel's failure to object to remarks at closing had substantial and injurious effect that influenced the juror's determination?
- 5). Whether due process was violated when petitioner's entire history was posted in the newspaper after and mistrial the a 3rd trial held?
- 6). Whether due process was violated when a 3rd degree felony is enhanced from 2+10 years to 25 to 99 years?
- 7). Whether Texas enhancement law violates double jeopardy and the U.S. Constitution due process guarantee?
- 8). Whether Texas affirmative finding law is vague and unconstitutional when it allows a non-aggravated offense to be governed by aggravated sentencing guidelines?
- 9). Whether due process was violated when firearm that was dismissed as part of a plea agreement then used in a subsequent proceeding as trial evidence and to obtain affirmative finding in another county?
- 10). Whether the Fifth Circuit should have conducted a plain error review?
- 11). Whether jurist of reason would find all claims presented or any claims presented to the lower courts debatable even ones not addressed by the Fifth Circuit?

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:

- 1) LORIE DAVIS
- 2) The State of Texas
- 3) Bobby Lumpkin

RELATED CASES

- QUINCY BUTLER V. THE STATE OF TEXAS NO. 10-13-00362-CR, 10TH COURT OF APPEALS, Judgment entered MAY 29, 2014
- QUINCY BUTLER V. THE STATE OF TEXAS NO. 12-00472-CRF-272nd DISTRICT COURT BRAZOS COUNTY, BRYAN TEXAS. Judgment OCT 31, 2013 ENTERED
- QUINCY BUTLER V. THE STATE OF TEXAS NO. 10-13-00430-CR COURT APPEALS TENTH DISTRICT COURT OF APPEALS. Judgment ENTERED
- QUINCY BUTLER V. LORIE DAVIS NO. 9:16-CV-210 U.S. DISTRICT COURT FOR EASTERN DISTRICT LUFKIN DIVISION. Judgment ENTERED
- QUINCY BUTLER V. BOBBY LUMPKIN NO. 20-40151 U.S. COURT OF APPEALS FOR FIFTH CIRCUIT. Judgment ENTERED
- QUINCY BUTLER V. THE STATE OF TEXAS NO. 10-12-00234-CR TENTH COURT OF APPEALS Judgment Entered ENTERED

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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 Oct 13, 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

28 U.S.C. 2254 Application WAS FILED
ATTACKING ONE CONVICTION OF DEADLY CONDUCT
TEXAS PENAL CODE 22.05(B). PETITIONER'S
WRIT WAS DENIED BY U.S. DISTRICT COURT
SEE (APPENDIX B). PETITIONER'S 6TH; 14TH
AMENDMENT OF THE U.S. CONST. WAS VIOLATED.
PETITIONER SEELED TO OBTAIN A COA IN THE
FIFTH CIRCUIT PURSUANT TO 28 U.S.C § 2253
(C)(2) SEE (APPENDIX A).

OTHER STATUTES INVOLVED Fed. R. Civ. Pro. Rule
52(b); Texas Penal Code 12.45; TEXAS Penal
Code 42.07 Texas Penal Code 42.01
Texas Penal Code 12.42.

STATEMENT OF THE CASE

PETITIONER QUINCY BUTLER WAS INDICTED FOR DEADLY CONDUCT AND UNLAWFUL POSSESSION OF A FIREARM BY A FELON ENHANCED TO A HABITUAL OFFENDER BASED ON TWO PRIOR DRUG POSSESSION OFFENSES IN CAUSE NO. 12-00472 IN BRAZOS COUNTY, TEXAS. TEX PENAL CODE 22.05 TEXAS PENAL CODE § 46.04 ICR at 9 (Indictment). PETITIONER'S INDICTMENT CONTAINED THE OFFENSES IN TWO SEPARATE COUNTS, COUNT I DEADLY CONDUCT, and COUNT II, Unlawful Possession of a Firearm by Felon, resulting from one event occurring on MAY 28, 2011 IN BRYAN, TEXAS. I.d

ON August 18, 2011 the petitioner was indicted by a Grand Jury in Cause No. 11-04068-CRF-272. Aggravated Assault with a Deadly weapon. Later after petitioner appeared at the Grand Jury Hearing on January 26, 2012 the petitioner was indicted in this cause No. 12-00472-CRF-272 Deadly Conduct and Unlawful Possession of a Firearm by a Felon. 2RR at 229; ICR p. 9.

On June 5-6, 2012 at the first trial, hereafter "1st trial", on trial for Deadly Conduct and Unlawful Possession of a Firearm, Appellant's pretrial motion to suppress his 2011 grand jury testimony was granted by the trial court the State appealed; the trial court declared a mistrial, AND ON MAY 2, 2013 Pet. ref'd (Memorandum Opinion) - ON SEPTEMBER 17-18, 2013 AT THE SECOND TRIAL hereafter "2nd trial" ending in ANOTHER mistrial, the State requested all their exhibits be withdrawn for use in the next trial. 3RR AT 388, 409 Reporter's Record R-3 AND R-4. ON October 29, 2013 AT third trial, hereafter 3rd trial, hereafter, petitioner was convicted after being tried only for DEADLY CONDUCT AND JURY MADE A DEADLY WEAPON finding enhanced, AND ASSESSED HIS PUNISHMENT AT (sixty two) 62 YEARS; Institutional Division of Texas Dept of Criminal Justice SCR AT 465-571. Petitioner filed a Notice of Appeal on Nov 5, 2013 SCR AT 516-517. Petitioner filed a ~~Notice of Appeal on Nov 5, 2013~~ Companion CASE, A Pretrial Application For writ of Habeas Corpus Seeking Relief from Double Jeopardy AND Collateral Estoppel relating to Count II denied by State Appeal Court. ~~relating to Count~~ SEE Ex Parte Quincy Deshan Butler,

CAUSE No. 16-13-00362-CR (Tex. App. - WACO, MAY 28, 2014)

Petitioner filed his Direct Appeal Brief (10-13-00430-CR) Tenth Court of Appeals; The Court Affirmed 1-8-15 then Petitioner filed A PDR PD-0129-15 with Date The Texas Court of Criminal Appeals which was refused

4-1-15,
DATE

(4)

PETITIONER FILED A WRIT WITH THIS COURT AND IT WAS REFUSED.
PETITIONER THEN LATER FILED A STATE WRIT OF HABEAS CORPUS
ALLEGING SEVERAL CONSTITUTIONAL CLAIMS WHICH WERE
DENIED BY THE STATE COURT WITHOUT A WRITTEN ORDER.
PETITIONER THEN FILED A TIMELY FEDERAL WRIT OF HABEAS
CORPUS USDC 9:16-CV-210 WHICH WAS DENIED THEN
PETITIONER FILED A TIMELY MOTION FOR CERTIFICATE OF
APPEALABILITY IN THE FIFTH CIRCUIT NO. 20-40151
WHICH WAS DENIED 10-13-21. THEN PETITIONER FILED A TIMELY
MOTION FOR REHEARING EN BANC WHICH WAS DENIED_____.

REASONS FOR GRANTING THE PETITION

THE FIFTH CIRCUIT HAS ENTERED A DECISION IN CONFLICT WITH DECISION OF ANOTHER UNITED STATES COURT OF APPEAL ON THE SAME IMPORTANT MATTER; PLAIN ERROR REVIEW; AND THE FIFTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN; BUT SHOULD BE SETTLED BY THIS COURT OR HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT. THERE IS A NATIONAL IMPORTANCE OF HAVING THE SUPREME COURT DECIDE THE QUESTIONS INVOLVED.

THE FIFTH CIRCUIT DECISION IS CONTRAST ALMOST EVERY OTHER COURT OF APPEALS; ALMOST EVERY OTHER COURT OF APPEALS CONDUCT PLAIN ERROR REVIEW OF UNPRESERVED ARGUMENTS INCLUDING UNPRESERVED FACTUAL ARGUMENTS.

U.S. v. GONZALES-CASTILLO, 562 F.3d 80, 83-84 (CA1 2007)

U.S. v. ROMEO, 385 Fed. Appx 45, 49-50 (CA2 2010)

U.S. v. Griffith, 504 Fed. Appx 122, 126-127 (CA3 2012)

U.S. v. Wells, 163 F.3d 889, 900 (CA4 1998)

U.S. v. Sargent, 19 Fed. Appx 268, 272 (CA6 2001), etc

THE FIFTH CIRCUIT DECISION TO DENY CERTIFICATE OF APPEALABILITY AND NOT ADDRESS THE CLAIMS PRESENTED IN THE U.S. DISTRICT COURT WAS ERRONEOUS AND THE IMPORTANCE OF THE SUPREME COURT TO DECIDE THESE QUESTIONS APPLIES TO THOSE SIMILARLY SITUATED. THE DECISION BY THE LOWER COURT

WAS ERRONEOUS IN VARIOUS WAYS. THERE WERE OVER (20) CONSTITUTIONAL CLAIMS RAISED THAT SURVIVED REASON WOULD FIND DEBATABLE; CLAIMS THAT WERE NOT EVEN ADDRESSED BY THE FIFTH CIRCUIT.

THE FIFTH CIRCUIT OPINION WAS BASED ON TWO COUNTS OF AGG ASSAULT WHEN PETITIONER WAS / HAD NOT BEEN TRIED OR CONVICTED FOR THOSE OFFENSES.

This demonstrates the Fifth Circuit's rubber stamp standard of reviews especially for pro se litigants, as mentioned in McGEE SR V. McFADDEN.

U.S. 139 S.Ct 2608; 204 L.Ed. 2d 1160; 2019 U.S. Lex 4445

THE FIFTH CIRCUIT decision has contradicted Barefoot v. Estelle; 463 U.S. 880, 893 n 4 103 S.Ct 3383-77 L.Ed 2d 1090 (1983) when CERTIFICATE OF PROBABLE CAUSE IS REQUIRED TO APPEAL FROM FINAL ORDER IN HABEAS PROCEEDING: 28 U.S.C § 2253.

The denial of a CERTIFICATE OF APPEALABILITY OF THE CONSTITUTIONAL CLAIM, NOT THE RESOLUTION OF THE DEBATE MILLER EL V COCKRELL, 537 U.S. 322, 333-335, 123 S.Ct 1029 154 L.Ed. 2d 931 (2003).

THE LOWER COURT SHOULD HAVE GRANTED BUTLER'S COA TO ALLOW REVIEW OF THE DISTRICT COURT'S CONCLUSION THAT THE AEDPA STANDARD WAS NOT MET. BECAUSE BUTLER HAS AT LEAST MADE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT." § 2253 (c)(2).

AT THE COA STAGE, THE ONLY QUESTION IS WHETHER THE APPLICANT HAS SHOWN THAT JURIST OF REASON COULD DISAGREE WITH THE DISTRICT COURT'S RESOLUTION OF HIS CONSTITUTIONAL CLAIMS OR THAT JURISTS COULD CONCLUDE THAT ISSUES PRESENTED ARE ADEQUATE TO DESERVE ENCOURAGEMENT TO PROCEED FURTHER. "Buck v. DAVIS, 586 U.S. 137 S.Ct 759 197 L.Ed 2d 1 (2017) (slip op at 13)

(quoting) MILLER-EL. V. Cockrell, 537 U.S.
322, 327, 123 S.Ct 1029, 154 L.Ed 2d 931 (2003).
This "threshold inquiry is more limiting AND
FORGIVING THAN ADJUDICATION OF THE ACTUAL
MERITS.

THIS COURT GRANTED CERTIORARI TO MCGEE SUPRA
BASED ON HIS BRADY CLAIM AND INDICATED
THE CASE DESERVED ENCOURAGEMENT TO PROCEED
FURTHER. MILLER-EL SUPRA

HERE BUTLER RAISE BRADY; INEFFECTIVE
COUNSEL AND DUE PROCESS VIOLATIONS BASED
ON THE TRIAL COURT'S DENIAL OF CROSS-EXAMINATION
OF A STATE'S WITNESS BY PLACING LIMITATIONS
ON THE CROSS-EXAMINATION. 8RR AT 209-217;

9RR AT 8-24; 13RR AT 6-17 (2nd MISTRIAL;
State Exhibit R-4. DAVIS V ALASKA, 415 U.S. 308

PETITIONER'S DUE PROCESS AND DUE COURSE OF LAW
RIGHTS, THE SIXTH AMENDMENT RIGHT TO
CONFRONTATION, THE ABILITY TO CROSS EXAM AND
IMPEACH STATE'S WITNESS WITH BRADY MATERIAL
AND VIOLATION OF TEXAS CONSTITUTION ART I
SECTION 10 AND 19. CRAWFORD V WASHINGTON

541 U.S. 36, 124 S.Ct 1354 (2004).

STRICKLAND V. WASHINGTON, 466 U.S. 668, 687, 104

S.Ct 2052, 2064, 80 L.Ed. 2d 674 (1984)

("THE CONSTITUTIONAL RIGHT OF CONFRONTATION")

INCLUDES THE RIGHT TO CROSS-EXAMINE THE
WITNESS AND THE OPPORTUNITY TO SHOW
THAT A WITNESS IS BIASED OR THAT HIS

(TESTIMONY IS EXAGGERATED OR UNBELIEVABLE.)

In all criminal prosecutions. the ACCUSED SHALL ENJOY
THE RIGHT ... TO BE CONFRONTED WITH THE WIT-
NESSES AGAINST HIM. 6TH AMEND of U.S. CONST
CRAWFORD V WASHINGTON 541 U.S. 36.

PETITIONER WAS TRIED (3) TIMES PLUS THE FIREARM
THAT WAS DISMISSED AS PART OF A PLEA WAS USED
IN ANOTHER PROCEEDING IN VIOLATION OF DOUBLE
JEOPARDY AND DOUBLE JEOPARDY COLLATERAL ESTOPPEL -
ASHE V. SWENSON 397 U.S. 436 (1970)

FURTHERMORE; AFTER THE SECOND MISTRIAL
BUTLER'S ENTIRE CRIMINAL HISTORY WAS POSTED
IN THE NEWS PAPER. MR. BUTLER DID NOT
TESTIFY AND HE WAS NOT TESTIFYING
IN THE FINAL TRIAL YET HIS HISTORY WAS
EXPOSED TO EACH POTENTIAL JUROR BEFORE TRIAL
VIOLATING DUE PROCESS. 14TH AMEND US CONST.

IN REFERENCE TO THE CLAIM OF DENIAL OF CROSS-EXAMINATION
THIS COURT EXPRESSED IN McGEE V. McFADDEN
U.S. 139 S.Ct 2608; 204 L.Ed. 2d 1160;
2019 U.S. LEX 4445 CERT GRANTED.

THE STATE COURT APPEALS (2019 US LEX 6) AFFIRMED
THAT CONCLUSION WITHOUT FURTHER ANALYSIS.
BUT THE TRIAL COURT'S REASONING WAS DOUBTFUL,
GIVEN THAT THIS COURT HAS SAID THAT A WITNESS
ATTEMPT TO OBTAIN A DEAL BEFORE TESTIFYING
CAN BE MATERIAL EVEN THOUGH THE STATE
HAD MADE NO BINDING PROMISES - WEARRY;

577 U.S. — 2d — 136 S.Ct 1002, 194 L.Ed 2d
78 (slip op. at 9) Citing NAPUE V. ILLINOIS. 360
U.S. 264, 270 79 S.Ct 1173, 3 L.Ed. 2d 1217 (1959).

IN THIS CASE BUTLER WAS DENIED CROSS-EXAMINATION
AND THE STATE'S WITNESS (DAVID ROBERSON) RECEIVED A
DEAL ON PENDING CHARGES HE HAD.

HOW CAN IT BE THAT JURIST OF REASON
COULDN'T FIND SUCH CLAIMS DEBATABLE?

THE STATE MADE IMPROPER REMARKS DURING CLOSING ARGUMENTS DURING THE DEADLY CONDUCT TRIAL STATING: "HE'S A MURDERER AT HEART".

PETITIONER WAS DENIED A FAIR TRIAL AND THIS REMARK HAD A PREJUDICIAL EFFECT ON THE OUTCOME OF THE CASE; AND IT INFLUENCED THE JUROR'S TO GIVE A 62 YEAR SENTENCE FOR A 2 TO 10 OFFENSE.

TRIAL COUNSEL FAILED TO OBJECT TO THIS REMARK WHICH HAD "SUBSTANTIAL AND INSURIOUS" EFFECT OR INFLUENCE IN THE JURY'S DETERMINATION." SEE Brecht v. Abrahamson, 507 U.S. 619, 637 (1993).

THIS WAS A CONSTITUTIONAL ERROR IN VIOLATION OF DUE PROCESS AND RIGHT TO FAIR TRIAL. 5TH; 6TH 14TH AMEND OF U.S. CONST.

IT CAN NOT BE SAID THAT PETITIONER'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL; AND PROSECUTORIAL MISCONDUCT WAS NOT DEBATABLE BASED ON CORRECT APPLICATION OF THE LAW AND FACTS INVOLVED.

TRIAL COUNSEL IN THIS CASE FAILED TO REQUEST A LESSER INCLUDED OFFENSE OF DISORDERLY CONDUCT - DISCHARGING A FIREARM TEX. PENAL CODE 42.01 (2) (7)

IT CAN NOT BE SAID JURIST OF REASONABLE WOULD NOT FIND THE DISTRICT COURT DECISION DEBATABLE BASED ON THE CLAIMS PRESENTED. THE SUPREME COURT IN BECK V. ALABAMA, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) THE FAILURE OF GIVING THE JURY THE OPTION OF CONVICTING ON A LESSER-INCLUDED OFFENSE WOULD

INEVITABLE TO ENHANCE THE RISK OF AN UNWARRANTED CONVICTION. IN HOPPER V. EVANS, 456 U.S. 605-611, 102 S.Ct 2049, 72 L.Ed.2d 367 (1982). "DUE PROCESS REQUIRES THAT A LESSER-INCLUDED OFFENSE INSTRUCTION BE GIVEN WHEN THE EVIDENCE WARRANTS SUCH AN INSTRUCTION. TO OBTAIN A CONVICTION FOR FELONY DEADLY CONDUCT THE STATE IS REQUIRED TO SHOW BEYOND A REASONABLE DOUBT THAT THE DEFENDANT: (1) KNOWINGLY (2) DISCHARGED 2 WEAPONS (3) AT OR IN THE DIRECTION OF ANOTHER. TEX. PENAL CODE ANN. 22.05 (b)(1). MISDEMEANOR DEADLY CONDUCT REQUIRES A SHOWING THAT THE DEFENDANT: (1) RECKLESSLY, (2) ENGAGED IN CONDUCT (3) THAT PLACED ANOTHER; (4) IN IMMINENT (5) OF SERIOUS BODILY INJURY § 22.05(2). RECKLESS AND DANGER ARE PRESUMED IF THE ACTOR KNOWINGLY POINTED A FIREARM AT OR IN THE ~~DIRECTION~~ DIRECTION OF ANOTHER. § 22.05 (c). HOWEVER, THIS STATUTORY PRESUMPTION IS NOT AN ELEMENT OF THE OFFENSE BECAUSE IT IS NOT PART OF THE STATUTORY DEFINITION OF THE CRIME. SINCE IT IS NOT EVIDENCE NOR DOES IT SUPPLY EVIDENCE, IT PLAYS NO PART IN DETERMINING WHETHER A DEFENDANT IS ENTITLED TO A LESSER-INCLUDED OFFENSE INSTRUCTION.

A PERSON ACTS RECKLESSLY, OR IS RECKLESS, WITH RESPECT TO CIRCUMSTANCE SURROUNDING HIS CONDUCT OF THE RESULT OF HIS CONDUCT WHEN HE IS AWARE OF BUT CONSCIOUSLY DISREGARDS A SUBSTANTIAL AND UNJUSTIFIABLE RISK THAT THE CIRCUMSTANCES EXIST OR THE RESULT WILL OCCUR. THERE WAS EVIDENCE TO SUPPORT A LESSER INCLUDED OFFENSE. THE ~~FIFTH IN~~ FIFTH CIRCUIT IN RICHARD V. QUARTERMAN 566 F.3d AT 569. IT WAS HELD TRIAL COUNSEL'S FAILURE TO REQUEST AN INSTRUCTION FELL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS AND THE STATE COURT'S CONCLUSION $\hat{=}$ THE FIFTH CIRCUIT'S CONCLUSION IS CONTRADICTORY AND WAS A UNREASONABLE APPLICATION OF STRICKLAND ID AT 569-70 RICHARD SUPRA.

PLAIN ERROR - THE STATE PROSECUTOR JASON GOSS
STATED AT (RR Vol 10 PAGE 59 LINE 11)

"HE'S A MURDERER IN HEART"; THIS WAS THE STATE'S
PERSONAL ASSERTION. "ASSERTION OF PERSONAL KNOWLEDGE
ARE APT TO CARRY MUCH WEIGHT AGAINST THE ACCUSED
WHEN THEY SHOULD PROPERLY CARRY NONE" BERGER V. U.S.
295 U.S. 78, 88 79 L.ED 1314. 55 S.Ct 629 (1935).

NO OBJECTION WAS MADE BY ATTORNEY KYLE HAWTHORNE.
MR. BUTLER WAS NOT ON TRIAL FOR MURDER,
NEITHER DID HE HAVE A VIOLENT HISTORY.

THE SUPREME COURT IN MICHELSON V. U.S. 335
U.S. 469, 476, 93 L.3d 168, 69 S.Ct 213 (1948)
HELD (stating that improper character evidence
"WEIGHS TOO MUCH WITH THE JURY AND OVERPERSUADES
THEM TO PREJUDGE ONE WITH A BAD GENERAL
RECORD AND DENIED HIM A FAIR OPPORTUNITY TO
DEFEND AGAINST A PARTICULAR CHARGE."

("HE'S A MURDERER AT HEART")

COUNSEL FAILED TO OBJECT AND IT CAN NOT
BE SAID THAT JURIST OF REASON WOULD NOT
FIND THIS CLAIM DEBATABLE; WHETHER
PLAIN ERROR OR INEFFECTIVE ASSISTANCE OF
COUNSEL OR THE CUMULATIVE EFFECT
ALL DENIED PETITIONER BUTLER DUE PROCESS,
AND HIS RIGHT TO A FAIR TRIAL. 5,6,14 Amend
OF U.S. CONST.

ANALYSIS:

Unless JUDGES TAKE CARE TO CARRY OUT THE LIMITED COA REVIEW WITH THE REQUISITE OPEN MIND, THE PROCESS BREAKS DOWN. A COURT OF APPEALS MIGHT INAPPROPRIATELY DECIDE THE MERITS OF AN APPEAL, AND IN DOING SO OVERSTEP THE BOUNDS OF ITS JURISDICTION. SEE BUCK, 580 U.S. AT ____ 137 S.Ct. ~~1029~~ 759, 197 L.Ed. 2d 1 (slip op. at 13). MILLER-EL 537 U.S. AT 336-337 123 S.Ct. 1029, 154 L. (204 L.Ed. 2d 1164) Ed. 2d 931. A DISTRICT COURT MIGHT FAIL TO RECOGNIZE THAT REASONABLE MINDS COULD DIFFER, OR WORSE THE LARGE VOLUME OF COA REQUESTS; THE SMALL CHANCE THAT ANY PARTICULAR PETITION WILL LEAD (2019 U.S. LEX 10) TO FURTHER REVIEW, AND THE PRESS OF COMPETING PRIORITIES MAY TURN THE CIRCUMSCRIBED COA STANDARD OF REVIEW INTO A RUBBER STAMP, ESPECIALLY FOR PRO SE LITIGANTS.

WE HAVE PERIODICALLY HAD TO REMIND LOWER COURTS NOT TO UNDULY RESTRICT THIS PATHWAY TO APPELLATE REVIEW. SEE EG. THARPE V. SELLERS, 583 U.S. ____ 138 S.Ct. 545, 199 L.Ed. 2d 424 (2018) (PERCURIAM); BUCK 580 U.S. ___, 137 S.Ct. 759, 197 L.Ed. 2d 1; TENWARD V. DETKE 542 U.S. 274, 124 S.Ct. 2562, 159 L.Ed. 2d 384 (2004). THIS CASE PROVIDES AN ILLUSTRATION OF WHAT CAN BE LOST WHEN COA REVIEW BECOMES HASTY. IT IS NOT WITHOUT COMPLICATIONS. THERE MAY BE GOOD ARGUMENTS. YET UNEXPLORED; WITH MCGEE'S CLAIM MAY FALL SHORT OF MEETING AEDPA STRICT REQUIREMENTS. SEE § 2254(c) AND OF COURSE, EVEN A FINDING THAT MCGEE'S CONSTITUTIONAL RIGHTS CLEARLY WERE VIOLATED WOULD NOT NECESSARILY IMPLY THAT HE'S INNOCENT OF THE SERIOUS CRIMES OF WHICH HE WAS CONVICTED; MCGEE COULD BE RECONVICTED AFTER A FAIRER PROCEEDING. SEE KYLES 514 U.S. AT 434-435 (139 S.Ct. 2612) 115 S.Ct. 1555, 131 L.Ed. 2d 490.

BUT THE WEIGHTY QUESTION WHETHER MCGEE IS IN CUSTODY IN VIOLATION OF THE CONSTITUTION," § 2254 (2) APPEARS TO HAVE GOTTEN SHORT SHIFT HERE.

WITH A LIFETIME OF LOST LIBERTY HANGING IN THE BALANCE THIS CLAIM WAS ILL SUITED TO SNAP JUDGMENT. TEXAS PENAL CODE 12.45 IN BUTLER'S CASE SHOWS THIS PENAL CODE IS VAGUE AND ALLOWED HIM TO BE PLACED AT RISK TO LIFE AND LIBERTY WITH A FIREARM THAT WAS DISMISSED AS PART OF A PLEA IN WALLER COUNTY, THEN LATER BRAZOS COUNTY USED THE FIREARM TO AGGRAVATE HIS OFFENSE BY WEAPONS FINDING. WHETHER TEXAS PENAL CODE 12.45 IS VAGUE? SEE (APPENDIX STATE APPEAL NO. 10-13-00362-CR) PAGE 5 FOOTNOTE ^{#2} STATES: UNDER SECTION 12.45 OF THE TEXAS PENAL CODE: A DEFENDANT IS PERMITTED TO ADMIT GUILT REGARDING AN UNADJUDICATED OFFENSE AND REQUEST THE TRIAL COURT TO CONSIDER THE OFFENSE WHEN DETERMINING PUNISHMENT FOR AN ADJUDICATED OFFENSE. TEX. PENAL CODE ANN § 12.45 (2) - (6) (WEST 2011) SEE E.G. EX PARTE PHARRIS NO. 14-11-00266-CR, 2012 TEX. APP. LEXIS 2939, at *10 (TEX-APP-HOUSTON [14TH DIST.] APR. 17 2012 PET. REF'D) (MEM. OP. NOT DESIGNATED FOR PUBLICATION). "IF A COURT LAWFULLY TAKE INTO ACCOUNT AN ADMITTED OFFENSE, PROSECUTION IS BARRED FOR THAT OFFENSE" TEX PENAL CODE ANN § 12.45 (C)

PETITIONER POSSESSION OF FIREARM WAS DISMISSED "AS PART OF THE PLEA" AND IT'S STATED ON THE WALLER COUNTY JUDGMENT OF SENTENCE; YET 12.45 WAS NOT ON THE DOCUMENT.

DOES A PENAL CODE HAVE TO BE DOCUMENTED IN ORDER FOR A OFFENSE TO BE BARRED FROM FURTHER PROSECUTION?

THE FIFTH AMENDMENT PROVIDES THAT NO PERSON SHALL BE DEPRIVED OF LIFE, LIBERTY OR PROPERTY.

WITHOUT DUE PROCESS OF LAW. THE GOVERNMENT VIOLATES THIS GUARANTEE BY TAKING AWAY SOMEONE'S LIFE, LIBERTY, OR PROPERTY UNDER A CRIMINAL LAW SO VAGUE THAT IT FAILS TO GIVE ORDINARY PEOPLE FAIR NOTICE OF THE CONDUCT IT PUNISHES OR SO STANDARDLESS THAT IT INVITES ARBITRARY ENFORCEMENT. THE PROHIBITION OF VAGUENESS IN CRIMINAL STATUTES IS A WELL-RECOGNIZED REQUIREMENT, CONSONANT ALIKE WITH ORDINARY NOTIONS OF FAIR PLAY AND THE SETTLED RULES OF LAW AND A STATUTE THAT FLOUTS IT VIOLATES THE FIRST ESSENTIAL OF DUE PROCESS. THESE PRINCIPLES APPLY NOT ONLY TO STATUTES DEFINING ELEMENTS OF CRIMES; BUT ALSO TO STATUTES FIXING SENTENCES. (SCALIA J. JOINED BY ROBERTS CH J AND GINSBURG, BREYER, SOTOMAYOR, AND KAGAN.

IN THE FIFTH CIRCUIT, DAVIS ACKNOWLEDGED THAT HE FAILED TO RAISE THAT ARGUMENT IN THE DISTRICT COURT. WHEN A CRIMINAL DEFENDANT FAILS TO RAISE AN ARGUMENT IN THE DISTRICT COURT, AN APPELLATE COURT ORDINARILY MAY REVIEW THE ISSUE ONLY FOR PLAIN ERROR. SEE FED. RULE CRIM. PRO. 52(b).

BUT THE FIFTH CIRCUIT REFUSED TO ENTERTAIN DAVIS ARGUMENT AT ALL. THE FIFTH CIRCUIT DID NOT EMPLOY PLAIN ERROR REVIEW BECAUSE THE COURT CHARACTERIZED DAVIS ARGUMENT AS RAISING FACTUAL ISSUES, AND UNDER FIFTH CIRCUIT PRECEDENT, [q]uestion 2020 U.S. LEX 3 OF FACT CAPABLE OF RESOLUTION BY THE DISTRICT COURT UPON PROPER OBJECTION AT SENTENCING CAN NEVER CONSTITUTE PLAIN ERROR "769 FED APPX 129 (2019) (PERCURIAM) (QUOTING US v LOPEZ 923 F.2d 47, 50 (1991) (PERCURIAM) BY CONTRAST; ALMOST EVERY OTHER COURT OF APPEALS CONDUCTS PLAIN ERROR REVIEW OF UNPRESERVED ARGUMENTS, INCLUDING UNPRESERVED FACTUAL ARGUMENTS.

RULE 52(b) STATES IN FULL: "A PLAIN ERROR THAT AFFECTS SUBSTANTIAL RIGHTS MAY BE CONSIDERED EVEN THOUGH IT WAS NOT BROUGHT TO THE COURT'S ATTENTION." THE TEXT OF RULE 52(b) DOES NOT IMMUNIZE FACTUAL ERRORS FROM PLAIN ERROR REVIEW.

THERE IS NO LEGAL BASIS FOR THE FIFTH CIRCUIT'S PRACTICE OF DECLINING TO REVIEW CERTAIN UNPRE-SERVED FACTUAL ARGUMENTS FOR PLAIN ERROR.

THE SUPREME COURT CASES DO NOT PURPORT TO SHIELD ANY CATEGORY OF ERRORS FROM PLAIN ERROR REVIEW. ROSALLES MERELES V. U.S. 585 U.S. 138 S.Ct. 1897, 201 L.Ed. 2d 376 (2018) US V OLANO 507 U.S. 725, 113 S.Ct. 1770, 133 L.Ed. 2d 508 140 S.Ct. 1062 (1993)

THE DENIAL OF A CERTIFICATE OF APPEALABILITY BY THE COURT OF APPEALS MAY BE REVIEWED BY THE UNITED STATES SUPREME COURT THROUGH A PETITION FOR WRIT OF CERTIORARI HORN V. UNITED STATES, 524 U.S. 236, 116 S.Ct. 1969, 1972, 141 L.Ed. 2d 242 (1998)

FOR A HABEAS APPLICANT TO RECEIVE A CERTIFICATE OF APPEALABILITY, THE PETITIONER MUST MAKE 'A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT AEDPA SECTION 101 CODIFIED AT 28 U.S.C § 2253 (3) (D) - (E). THE JUDGE MUST ISSUE A CERTIFICATE OF APPEALABILITY IF THE APPEAL PRESENTS A QUESTION OF SOME SUBSTANCE EITHER (1) THAT IS DEBATABLE AMONG JURISTS OF REASON. (2) THAT A COURT COULD RESOLVE IN A DIFFERENT MANNER.

(3) THAT IS ADEQUATE TO DESERVE ENCOURAGEMENT TO PROCEED FURTHER BARREFOOT V. RSTELLE, 463 U.S. 820, 893 n.l 103 S.Ct 3383 77 L.Ed 2d 1090 (1983)

IT MAY ALSO BE HELD A SUBSTANTIAL ISSUE EXISTS WHEN THE RESULT SOUGHT ON APPEAL IS NOT SQUARELY

FORFEITED BY STATUTE, RULE OR AUTHORITY COURT
DECISION OR LACKING ANY FACTUAL BASIS IN THE RECORD.
SEE AUTRY V. ESTELLE 464 U.S. 1301, 1302 104 S.Ct. 24, 78
L.Ed. 2d 7 (1983) BECAUSE OF POTENTIAL CONFLICT BETWEEN
CIRCUITS IT COULD NOT BE SAID THAT THE ISSUE LACK
SUBSTANCE.

IT IS NOT PROPER TO FIND THAT THE PETITIONER HAS
FAILED TO MAKE A "SUBSTANTIAL SHOWING" FOR THE
CERTIFICATE SIMPLY BECAUSE THE DISTRICT HAS DENIED
THE PETITION ON THE MERITS BADDELEY V. ESTELLE, 463 U.S. 880
893 n4 103 S.Ct. 3383 77 L.Ed. 2d 1090 (1983)

GRAHAM V. LYNAGH 854 F.2d 715, 717 (5th Cir. [Tex.] (1988)
THE QUESTION IS THE DEBATABILITY OF THE CONSTITUTIONAL
CLAIMS, NOT THE RESOLUTION OF THE DEBATE.

MILLER EL V. COCKRELL 537 U.S. 322 333-335, 123 S.Ct. 1029
154 L.Ed. 2d 931 (2003) OVERTURNING DENIAL OF CERTIFICATE
BECAUSE PETITIONER RAISED SUBSTANTIAL BATON QUESTIONS
IN LIGHT OF NUMBER OF AFRICAN AMERICANS EXCLUDED.
DESPERATE QUESTIONING OF MINORITY AND WHITE PROSECUTIVE
JURORS AND PROSECUTIONS USE OF JURY SHUFFLE POSSIBLE
FOR REASON OF RACE.

IN THIS CASE COUNSEL FAILED TO OBJECT TO STATE'S
REFERENCE TO BEING A "MURDERER AT HEART"
COUNSEL FAILED TO REQUEST LESSER INCLUDED OFFENSE
OF DISORDERLY CONDUCT DISCHARGING A FIREARM TEXAS
PENAL CODE §§ 42.07 (2)(7) & (a)(2)(B)
WHEN THE ELEMENTS OF A LESSER INCLUDED
WERE PRESENTED IN THE CHARGING INSTRUMENT.
COUNSEL WAS DENIED FULL CROSS-EXAMINATION
OF STATE'S WITNESSES WHICH DENIED DUE
PROCESS AND IT CANNOT BE SAID JURIST OF
REASON COULD NOT FIND CLAIMS DEBATABLE.

HERE MR. BUTLER WAS SENTENCED 62 YEARS FOR DEADLY CONDUCT A 2 + 6 10 YEAR OFFENSE ENHANCED WITH A DEADLY WEAPON FINDING. Hernandez v US

140 S.Ct 762 Citing PEPPER v US 562 U.S. 476, 493

131 S.Ct 1229, 179 L.Ed. 2d 196 (quoting § 3553)

(a) Nothing more is needed to preserve a claim that a longer sentence is unreasonable.

DEFENDANTS NEED NOT ALSO refer to the reasonableness of a sentence Rule 51 ABOLISHED the requirement of making formal "exception" to a district court's decision. And in any event, reasonableness pertains to the STANDARD OF APPELLATE REVIEW of a trial court's (2020 U.S. Lex) SENTENCING DECISION.

GALL v U.S. 562 U.S. 38, 46, 128 S.Ct 586, 169

L.Ed. 2d 445 SEE Id; Rule 52(b) (permitting review of a plain error "even though it was not brought to the court's attention"). The Supreme granted Petition for Certiorari.

SEE (APPENDIX FIFTH Circuit's JUDGMENT) pg. 2

STATES "28 U.S.C § 2254 application in which he attacked his conviction for two counts of AGGRAVATED ASSAULT with a deadly weapon.

Mr. Butler was not convicted of aggravated assault; neither was there a(2) counts; for

the offense he was convicted of which shows the Fifth Circuit didn't review claim or PETITION adequately to make a reasonable determination.

Mr. Butler asserts that he received ineffective assistance of counsel at pre-trial; trial; and appellate levels. In addition he was denied a fair trial due to improper remarks; in reference to murderer at deadly conduct trial. Furthermore: Mr. Butler claimed double Jeopardy Collateral Estoppel violated his Constitutional Right.

Also during TRIAL COURT LIMITED CROSS-EXAMINATION IN VIOLATION OF HIS RIGHT TO EFFECTIVE COUNSEL AND MR. BUTLER WAS DENIED AN EVIDENTIARY HEARING BY STATE & FEDERAL COURTS.

IN CONSIDERATION OF MR. BUTLER'S INEFFECTIVE ASSISTANCE OF COUNSEL AS STATED BY OTHER CIRCUITS "WHEN AN ATTORNEY HAS MADE A SERIES OF ERRORS THAT PREVENTS THE PROPER PRESENTATION OF A DEFENSE; IT IS APPROPRIATE TO CONSIDER THE CUMULATIVE IMPACT OF THE ERRORS IN ASSESSING PREJUDICE"; TURNER V. DUNCAN, 157 F.3d 449

Id at 457 [citing HARRIS V WOOD 64 F.3d 1432 1438-39 (9th Cir. 1998)]

UNDER § 2254 (2) A HABEAS COURT MUST DETERMINATION WHAT ARGUMENTS OR THEORIES SUPPORTED ... THE STATE COURT'S DECISION AND THEN IT MUST ASK WHETHER IT IS POSSIBLE FAIRMINDED JURISTS COULD DISAGREE THAT THOSE ARGUMENTS OR THEORIES ARE INCONSISTENT WITH THE HOLDING IN A PRIOR DECISION OF THIS COURT "Harrington v Richter 562 U.S. - 131 S.Ct 770, 178 L.Ed. 2d 624 (2011).

WHEREFORE AFTER PREMISES CONSIDERED
JURIST OF REASON WOULD HAVE
FOUND CLAIMS DEBATABLE AND THE
CONFLICTING RULING ON PLAIN ERROR.
Should be ADDRESS BY THIS
COURT.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jimmy Butler

Date: _____