No. 21A38

21-7380

ORIGINAL

Supreme Court, U.S.
FILED
DEC 21 2021
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IN THE

SUPREME COURT OF THE UNITED STATES

Frank Brown — PETITIONER
(Your Name)

vs.

Bobby Lumpkin, et. al. — 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

Frank Brown #01980921
(Your Name)

125 private Rd. 4303
(Address)

Hondo, TX. 78861
(City, State, Zip Code)

N/A
(Phone Number)

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SUPREME COURT, U.S.

QUESTION(S) PRESENTED

A. Trial Court erred

4). By allowing the prosecutor to argue facts not in evidence.

B. The prosecutor erred

6). By arguing facts not in evidence during closing arguments.

C. Trial counsel provided ineffective assistance when counsel

10). Failed to object to the prosecutor arguing facts not in evidence during closing.

D. Appellate counsel provided ineffective assistance [redacted] when failed

12). To raise and brief that the Trial Court erred when he allowed the prosecutor to argue facts not in evidence.

13). To raise and brief that trial counsel provided ineffective assistance of counsel when he failed to object to the prosecutor arguing facts not in evidence.

E. TCCA decision should not receive deference (claim 15)

F. It was error for the United States Court of Appeals for the Fifth Circuit to not issue a (COA) claim 16

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover

[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 is as follows:

Presiding Judge:

At trial: Hon. Clifford A. Brown
P.O. Box 1748
147th Judicial District
Austin, TX. 78767

on Appeal: David Puryear, Justice
Third Court of Appeals For Texas
Austin, TX.

For the State:

At trial: Emily Edwards
Travis County District Attorney
SBOT # 24069666

Ryann Reaud
Travis County District Attorney
SBOT # 24065953

on Appeal: Mr. Matthew Foye
Travis County District Attorney

LIST OF PARTIES continued...

For the Appellant:

At trial: Raymond Espersen
316 W. 12th St.
Austin, TX. 78701
SBOT # 06667550

on Appeal: Shannon Hooks
6910 Halt Lane # 510
Austin, TX. 78731
SBOT # 24045001

on petition for writ of certiorari: Frank Brown, pro se
TDCJ-ID No. 01980921
Torres unit
125 private Rd. 4303
Hondo, TX. 78861

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TABLE OF AUTHORITIES CITED

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 E 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 D 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 B 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 Third Court [redacted] of Appeals Austin, TX. court 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.

JURISDICTION

[✓] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was 5th circuit.

[✓] 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 January 8, 2022 (date) on September 23, 2021 (date) in Application No. 21A38.

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 tx. court criminal Appeals. 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

1). Articles 10.5

2) Article I, Section 10

3) Rule 52(a)

4). Rule of Evid. 402

5). Rule of Evid.

6). Supreme court Rule 10

7). Tex. Code. Crim. Proc. Ann. art. 44-33 (a)

8). Tex. Gov. Code Ann § 22-108(a)

9). Tex. R. of Evid 103

10). TX. Code of Crim Proc 1.051

11). TX. Code of Crim Proc 2.03 (b)

12). ~~TX~~ TX. Const. Art. 10.5

13). TX. R. App. P. 21.2

14). TX. R. App. Proc. 44.2 (b)

15). U.S. Const. 6th Amend.

16). U.S. Const. 14th Amend.

17). Vernon's Ann. TX. Const. Art. 1, §10.

18). 28 U.S.C.A. §2254 (d) (1,2)

STATEMENT OF THE CASE

on march 20, 2014, a Travis county grand jury returned an indictment in cause number D-1-DC-200998. The indictment alleged that Appellant on or about the 19th day of February 2014, in the County of Travis, and the State of Texas did then and there, having been Convicted of the Felony offense of attempted evading arrest on the 22nd day of September, 2011, in cause number D-1-DC-11-204668 in the 299th Judicial District Court of Travis County, Texas, intentionally or Knowingly possess a Firearm before the Fifth anniversary of Appellant's release from following conviction of said Felony, ROA 12-13.

The indictment also contained two enhancement paragraphs:

"The Grand Jury Fulther alleged that Appellant had previously been convicted of burglary of a habitation on the 8th day of January, 2008, in cause number D-1-DC-07-302366 in the 167th Judicial District Court of Travis County, Texas; which Conviction had become Final before the commission of the offense alleged in the preceding paragraph."

"The Grand Jury also presented that Appellant had been Convicted of burglary of a habitation on the 29th day of November, 2004, in Cause number 3041112 in the 147th Judicial District Court of Travis County, Texas; Conviction had become final before the commission of the offense alleged in the preceding paragraph. Against the peace and dignity of the state," ROA 12-13.

on February 3, 2015, Appellant's case went to trial before the Honorable Judge Clifford Brown. Reporter's Record, vol. 3, p. 1. on the same day, the jury returned a verdict of "guilty." RoA 141. Sentencing took place on February 4, 2015, also before Judge Brown. Reporter's Record, vol. 4, p.1. Appellant was sentenced to 25 years' imprisonment. RoA 149. Appellant Filed his notice of appeal on march 3, 2015. RoA 154.

STATEMENT OF PROCEDURAL HISTORY

In cause No. D-1-DC-14-200998, the petitioner was charged with the offense of unlawful possession of a Firearm by Felon. The petitioner was convicted of such offense on february 3, 2015 and appealed the conviction on June 3, 2016, the third court of Appeals affirmed the conviction. on August 31, the petitioner Filed his petition for Discretionary Review. on November 2, 2016, the Texas court of criminal Appeals denied discretionary review, on January 23, 2017 petitioner Filed for writ of certiorari with supreme court of the united states appealing the Texas court of criminal appeals denial of petitioner's "P.D.R" in cause No. 16-8584 on June 5, 2017 said writ in said cause was denied. on 7-25-2018 petitioner Filed a writ of habeas corpus with the Texas court of criminal Appeals in cause No. WR-88-733-01 on 11-21-2018 writ of habeas corpus was denied petitioner Filed a 2254 on 12-7-2018 with U.S. western District of Texas in cause No. 1:18-cv-1054-LY on 7-22-2020 2254 was denied. on or about petitioner Filed a COA with the 5th circuit 11-2-2020 in cause No. 20-50651 on 7-22-2021 motion For COA was denied

REASONS FOR GRANTING THE PETITION

Introduction

For the reasons below not only was the lower court's decision erroneous. The National importance of having the supreme court decide this case not only to me but to others similarly situated.

As outlined in Stone v. Powell, 428 U.S. 490-95 the state will provide an opportunity for Full and Fair litigation of a Fourth Amendment claim however the prosecutor deprived the petitioner For Full and Fair litigation of a fourth Amendment claim. Emphasized in petitioner's objections to respondent's claim 1F, 2E, objections to the magistrates Report and Recommendations claims A4, B7, A6, B-10, C-14, and in petitioner's writ of certiorari claims A4, B-6, C-10 see Exhibit D.

which mislead and caused confusion of the issues prevented the jury to extract the kernel of controversy [redacted] which in this case did the petitioner possess a firearm, and did the officers have probable cause to stop the petitioner.

with technology evolving at a alarming rate within a matter of seconds at any place at any given time people from their cell phone can creat images, film, photographs which in turn attorney's, and prosecuter's can present these to the jury which can deprive the defendant, and the prosecution a Fair trial.

All of the case law on demonstrative evidence that has been ruled on is outdated, not current with the times, with the evolving technology.

This court needs to settle this issue so others similarly situated will not be deprived of a fair trial due to demonstrative being created in a matter of seconds by advanced technology.

The magistrate and the respondent claim that the petitioner procedurally defaulted this claim, and has failed to show 1) cause for the default or 2) that the court's failure to consider his claim will result in a "Fundamental miscarriage of justice."

For the following reason(s) the petitioner will prove that he has demonstrated [redacted] cause for this procedurally defaulted claim.

In order to show cause the petitioner must present that some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rule." 477 U.S., at 488 for example "a showing that the factual or legal basis for a claim was not reasonably available to counsel, or that 'some interference by officials' made compliance impracticable would constitute cause for a procedural default Coleman v. Thompson, 111 S.Ct. at 2566.

The court allowed the prosecutor to create demonstrative evidence that was prejudicial to the petitioner see emphasis in petitioner's objection to respondent's claim 1F.

The magistrate claims that petitioner's argument that the trial judge should of not allowed the prosecuter to create demonstrative evidence, that petitioner has failed to show cause for the default.

The magistrate has erred because

Federal judges are responsible for the tone and tempo of proceedings before them, not mere moderators or hosts at a symposium. E.g., Moore v. United States, 59 F.2d 439, 442 (5th Cir. 1979); U.S. v. Davis, 546 F.2d 617, 622 (5th Cir. 1977). Tendencies in counsel to pursue irrelevant matter are fully subject to control by the court as are impertinent or side-bar remarks.

U.S. v. Perez, 651 F.2d 268, at 271 Trial judge has an obligation in the interests of fairness and justice to stop the prosecutor from delievering a greatly prejudicial argument see Viereck v. United States, 63 S.Ct. 561.

In other words the trial judge has a obligation to make sure the trial is conducted properly to ensure a defendant is guaranteed a fair trial.

which the trial judge in this case did not because he allowed the prosecutor to create prejudicial demonstrative evidence emphasized in petitioner's objection to Respondent's claim 1F, and 2E.

It is not the gravity of the trial judges error that matters, but that it constitutes a violation of petitioner's right to the expansive protection afforded by the Fourteenth Amendment's guarantee of fundamental fairness in state criminal proceedings Coleman v. Thompson, 111 S.Ct. at 2569.

So this error must be seen as external factor, i.e., "imputed to the state." ("the constitutional mandate [guaranteeing expansive protection afforded by the Fourteenth Amendment's guarantee fairness in state criminal proceedings] (which the trial judge has a obligation to make sure a defendant is guaranteed this at trial). Is addressed to the action of the State in obtaining a criminal conviction through a procedure that fails to meet the standard of due process of law").

Coleman v. Thompson, 111 S.Ct. at 2567

Trial judge has an obligation in the interests of fairness and justice to stop the prosecutor from delivering a greatly prejudicial argument see Viereck v. United States, 63 S.Ct. 561

Rule 402: Relevant evidence Generally admissible; Irrelevant Evidence Inadmissible.

see Erazo v. State, 144 S.W.3d at 502

Confusion, or WASTE of TIME

Rule 403 113 speaks to three distinct but interrelated goals: 1) the avoidance of an incorrectly based result; 2) the promotion of judicial efficiency. 114 This rule emphasizes the importance of the truth-seeking function of a criminal trial." 115 but it does give a trial judge some discretion" 116 in excluding other wise relevant evidence when that evidence is "substantially outweighed" by specified [redacted] countervailing [redacted] Factors." 117 if probative value and the countervailing Factor are in rough parity," the evidence may not be excluded Erazo v. State, 144 S.W.3d at Appendix.

see Fed. R. Evid. 403 As originally drafted, federal rule 403 read:

Exclusion of Relevant Evidence on Grounds of prejudice, confusion, or waste of time.

(A) EXCLUSION MANDATORY. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

(B) EXCLUSION [redacted] DISCRETIONARY. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Erazo v. State, 144 S.W.3d APPENDIX 113

Dolan, Rule 403: The prejudice Rule in Evidence, 49 S. Cal. L. Rev. 220, 220 (1976). In separating these three goals, professor Dolan states the First "aims at control by the judge of the information which reaches the fact finder usually the jury, In such a way that the probability of objectively 'correct factual determinations is maximized." Id. That is the trial judge should ensure that the jury keeps it's eye on the ball" of the litigated issues and is not misdirected in it's Focus, thereby running a risk of reaching an incorrect result because of misleading or improperly emotionally-charged material - with respect to the second goal of actual and perceived justness of the system, rule 403 acts by discouraging the use of reprehsible tactics by counsel, by Protecting witnesses From harassment, and by encouraging production of evidence in accordance with the properly expected de corum of a trial." id. at 228

Erazo v. State, 144 S.W.3d APPENDIX 114

Trial judges will rule in a way that will enable them to Finish the trial with an abiding sense that rationality rather than prejudice decided the issues

Erazo v. State, 144 S.W.3d APPENDIX 121

In other words the trial judge has a obligation to make sure the trial is conducted properly to ensure a defendant is guaranteed a fair trial.

with that being said now we have to carefully analyze this error to determine if this error was outside the trial's courts broad discretion to manage the conduct of the trial as outlined in Hall v. State, 2009 Tex. App. LEXIS at 4960 unpublished

The prosecutor committed misconduct during closing argument by arguing with facts not in evidence.

STANDARD OF REVIEW

The four permissible areas of jury argument are (1) summation of the evidence, (2) reasonable deductions drawn from the evidence, (3) answer to opposing counsel's argument, and (4) a plea for law enforcement. Brown v. State, 270 S.W.3d 564, 570 (Tex. Crim. App. 2008). A prosecutor may argue her opinion concerning issues in the case only when the opinion is based on the evidence in the record and does not constitute unsworn testimony.

McKay v. State, 707 S.W.2d 23, 37 (Tex. Crim. App. 1985).

When a jury argument exceeds these approved areas, it will constitute reversible error if the argument is extreme or obviously improper, violative of a mandatory statute, or inject new facts harmful to the accused into the trial proceeding. Wesbrook v. State, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000). The appellate court must analyze the statement in light of the entire argument, and not on isolated sentences. DeLarue v. State, 102 [redacted] S.W.3d 388, 405 (Tex. App. - Houston [14th Dist.] 2003, pet. ref'd). Error in allowing improper argument is generally non-constitutional error that cannot be disregarded when it affects the defendant's substantial rights. TEX. R. APP. P. 44.2 (b); Brown, 270 S.W.3d at 572.

Argument

During closing arguments of Appellant's trial, the assistant district attorney made a demonstration before the jury, saying:

"Ladies and gentlemen, I'm going to stand here and I'm going to pull up the camera function on my iphone and I'm going to take a picture of the judge right here. In that photograph, you see the judge, but you do not see the lovely Kim Lee who is sitting here today all facing the same general direction, that we all can see the Judge and us. Kim Lee. I would submit to you that that is the source of a lot of the issues that Mr. Espersen wants you to focus on in this case here today. Reporter Record Vol. 3 p. 153.

As stated above, a prosecuter may argue her opinion concerning issues in the case only when the opinion is based on the evidence in the record and does not constitute unsworn testimony. Mckay v. State, 707 S.W.2d 23, 37 (Tex. Crim. App. 1985). In this case, the prosecuter created demonstrative evidence, using her cell phone to demonstrate her opinion that the police camera was similarly situated, and therefore unable to capture the unfolding events. There was no testimony presented at trial involving cell phones, or any similarity between taking cell phone photographs of film. By creating such demonstrative evidence, [redacted]

The prosecutor has unfairly used unsworn testimony to argue her position. Because closing argument occurs at perhaps the most crucial part of trial, the prosecuter's misconduct was greatly prejudicial toward the Appellant.

We first address the admissibility of the cell phone demonstration made by the prosecuter, which was a

Picture of petitioner's court room reporter, the prosecuter created demonstrative evidence, using her cell phone to demonstrate her opinion that the police camera was similarly situated, and there unable to capture the unfolding events.

The court of criminal appeals has observed, "A picture is worth a thousand words. Yet those words, in the context of a criminal trial, must be the right words, [redacted] otherwise, the picture from whence the words flow is inadmissible Erazo v. State, 144 S.W.3d 487, 488. A photograph is inadmissible if it is substantially more prejudicial than probative." Id. (citing Tex. R. Evid. 403)

Rule 403 rulings are highly dependant upon the particular circumstances of the case and the specific context in which the evidence is offered. Rule 403 is a fail safe mechanism that gives the trial judge some discretion in excluding relevant, otherwise admissible evidence, when one of the explicit counter factors listed in the rule ("the danger of unfair prejudice, confusion of the issues, or misleading the jury") substantially outweighs the probative value of the proffered evidence.

Erazo v. State, 144 S.W.3d 497

Rule 403 provides that evidence "may be excluded, thus significant discretion to the trial judge. The Appellate court will not reverse a Rule 403 decision simply because the Appellate Judges would have ruled differently had they been trying the case. Error will be found only if the trial judges decision cannot be supported by reasonable argument.

Erazo v. State, 144 S.W.3d at 500

Appellate courts [should also be] sympathetic to the fact that the trial court does not usually have luxury of carefully balancing, and even if it had time, the balance of factors is rarely crystal-clear. As the court stated in Cooley v. Carmike Cinemas, inc, 25 F.3d 1325 (6th Cir. 1994):

Essentially, Appellate courts will check to see that a balancing process has been conducted; the result of a careful balancing process will not itself be second guessed (citation omitted).

Erazo v. State, 144 S.W.3d 500

In our view of any trial record, we are mindful that evidentiary questions often require a trial judge to make quick decisions on doubtful questions. This is why we review evidentiary decisions for abuse of discretion [Rule 403 challenges]

Erazo v. State, 144 S.W.3d at 500

See Robbins v. State, 88 S.W.3d 256 <u>each word of the rule 403 test is significant</u>.

The trial judge must a full explanation on the record as to precise rationale he used in exercising his discretion in this manner, or the appellate court may well determine that the trial court was simply not doing his job, rather than doing it creatively, conscientiously, and correctly,

Erazo v. State, 144 S.W.3d APPENDIX 124

In Reese, we reaffirmed "that a Rule 403 analysis by Trial court should include, but is not limited to" the following factors: 1) the probative value of the evidence. 2). the potential of the evidence to impress the jury in some irrational, but nevertheless indelible way, 3) the time the proponet needs to develope the evidence, and 4) the proponent's need for the evidence. See Reese, 33 S.W.3d at 240-41

As stated above each word of the 403 test is significant; the trial judge has some discretion in excluding relevant otherwise admissible evidence. When one of the explicit counter factors listed in the rule. ("the danger of unfair prejudice, confusion of the issues, or misleading the jury" substantially outweighs the probative value of the proffered evidence.

The trial judge has no discretion in this case to stop the prosecutor from creating demonstrative evidence because the cell phone demonstration made by the prosecuter was not relevant evidence in petitioner's case there was no testimony presented at trial involving cell phones, or any similarity between taking cell phone photographs or film.

Demonstrative evidence cannot walk into evidence by themselves. They must be talked into evidence by a witness Erazo v. State, 144 S.W.3d at 497.

The probative value of Demonstrative Evidence that floats into evidence by itself is virtually nil.
Erazo v. State, 144 S.W.3d 498.

Even assuming that prosecuters demonstrative evidence had relevance or probative value to the issues at trial. It (which was the officer's argument was to being able to observe petitioner commit the traffic infractions and they are not captured on the police camera is because of the vantage point they are at).

was not outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, and it was a clear abuse of discretion by the trial court to manage to mode and conduct of the trial as outlined in Hall v. State, 2009 Tex. App. LEXIS at 4960.

The demonstrative evidence presented by the prosecuter was inadmissible under 403 because, although the first Factor may weigh in favor of admissibility, this Factor was not enough to overcome the prejudicial qualities of the demonstrative evidence, which in this case is the risk of causing confusion of the issues or of misleading the jury.

The probative value by the demonstrative evidence is slight because where a camera is positioned will determine what unfolding events it will be able to capture. However that's only one factor other factors that determine what all unfolding events a camera will be able to capture, and how they capture and display those events is how technically advance the camera is or the quality of the camera or if it's installed properly those are just a few factors out of several.

Especially during 2015 when the trial took place most cell phone camera's did not take good quality photos or film, and had a very limited scope. However in 2020 cell phone cameras are more technically advanced.

The point that petitioner is trying to make is that the way the prosecuter's iphone camera captures and display photos and film is significantly different than the way the police dash camera captures film and photos. For one the police camera takes a wider picture than the prosecutor's iphone camera which the prosecutor's iphone takes a narrower picture. which the evidence at trial proves this because the police video shows all lanes of traffic and the busness on both sides of the road. cause of these differences the prosecutor caused confussion of the issues and mislead the jury.

misleading the jury will likely occur when evidence is seductively persuasive -- a good and distinct definition. Dolan Rule 403: prejudice Rule in Evidence, 49 S. CAL L. REV. 220, 240-42 (1976).

Erazo v. State, 144 S.W. 3d APPENDIX 132

Another Factor to consider in 403 rulings in the third Factor the time needed to develope the evidence which is high and more and likely impossible because the prosecutor admission of the demonstrative would require additional evidence which would possibly require testimony from technical experts explaining the differences the way the prosecutor's cell phone camera captures and displays film and photographs compared to the police dash camera which the way the police dash camera, and the prosecutor cell phone significantly differ in that regard.

Also the experts would have to emphasize [redacted] vantage point or how a camera is positioned will determine what all unfolding events a camera will be able to capture, how they capture and display those events. The experts would have to explain other Factors like it depends how technically advanced the camera is or the quality of the camera or if it's installed properly and other several technical complicated data.

Since these new witnesses will be needed whose cross-examination and impeachment may lead to further issues; and that thus the trial will be unduly prolonged, and the multiplicity of minor issues will be such that the jury will lose sight of the main issues, and the whole evidence will be only a mass of confused data from which it will be difficult to extract to kernel of controversy

Erazo v. State, 144 S.W.3d APPENDIX 13

with considering these factors it would be impossible to develope the prosecutor's demonstrative evidence to the jury without causing confusing of the issues, and misleading the jury.

Another factor the fourth factor the proponent's need for the evidence. Erazo v. State, 144 S.W.3d at 489.

The prosecutor didn't need this evidence because officer mason and Stevenson already testified to being able to petitioner commit the traffic infractions and you can't see the infractions on the video is because of the vantage point they were at thus the officer's explanation [redacted] for why they could observe the traffic infractions, and you can't see it on the police video was already before the jury and the trial court should have concluded that the cell phone demonstration was outside the record, would not aid the jury in resolving the issues, unnecessary and, at worse, could mislead the jury into [redacted] believing the scope of the police camera less limited than it actually was as outlined in Davis v. State, 2008 TEX. APP. LEXIS at 6466-67 emphasizing the 403 balancing factors.

In United States v. Michelena-Orovio, 702 F.2d 496, 499-500 (5th Cir. 1983) trial court did not err in [redacted]

In United States v. Michelena - Orovio, 702 F.2d 496, 499-500 (5th Cir. 1983) trial court did not err in denying defendant's request to have jury smell one bale of marihuana in courtroom), cert. denied, 465 U.S. 1104, 80 L.Ed.2d 135 104 S.Ct. 1605 (1984). In Michelena - Orovio, government witness had testified they searched a ship because of odor emanating from 363 bales of marihuana Id. The defendant argued that there was no reasonable justification for searching since the agents could not have detected the smell. The court found that placing one bale of marihuana in the courtroom a year after it's seizure did not replicate the conditions at the time of the search and the jury would be confused by this demonstration. Id.

The Michelena - Orovio, 702 F.2d 496, 499-500 Court excluded this demonstration on it's own without having the prosecuter to object.

petitioner's trial court should of done what the Michelena-Orovio, 702 F.2d 496, 499-500 court did and [redacted] excluded the prosecuter's cell phone demonstration on it's own [redacted] without having petitioner's attorney to object. Because the prosecutor's demonstration did not replicate the conditions of the traffic infraction and stop, and the scope of the police officer's dash camera which would of confused, and mislead the jury.

Based off the facts mentioned above petitioner's trial court had a obligation to exclude the demonstration on it's own

Had a obligation to atleast conduct a [redacted] rule 403 analysis. The rule permits, but does not compel the exclusion.

Based off petitioner's circumstances, the trial court had a obligation to atleast conduct a rule 403 analysis. The rule permits, but does not [redacted] compel the exclusion of evidence which runs a foul of it's terms. Therefore, even if the judge finds that the probative value of the evidence is outweigh by contervailing factors, he may look to other matters in exercising his discretion and still admit the evidence. Dolan Rule 403: Dolan Rule 403: As a caveat, however, the trial judge must a full explanation on the record as to the precise rationale he used in exercising his discretion in this manner, or the Appellate court may well determine that the trial court was simply not doing his job, rather than doing it creatively, conscientiously, and correctly.

which petitioner's trial court failed to do so, the Appellate court should determine that the trial court was simply not doing his job, rather than doing creatively, conscientiously, and correctly as outlined in Erazo v. State, 144 S.W.3d APPENDIX 124.

The Appellate courts in petitioner's case erred because they did not check that a balancing process has been conducted. Erazo v. State, 144 S.W.3d at 500.

Even considering the fact that the trial court does not usually have the luxury of carefully balancing. which often require a trial [redacted] judge to make a quick decisions on evidentiary questions on doubtful questions.

The error committed by the prosecuter should have been quickly recognized by the trial court, the trial court should of not allowed the prosecuter to make the demonstration, to the jury because:

1). it was not evidence in petitioner's case, as outlined in mckay v. State, 207 S.W. 2d 23, 37, Brown v. State, 270 S.W. 3d 564, 570

2). The prosecution used it for some nefarious purpose unrelated to the circumstances of the offense, Erazo v. State, 144 S.W. 3d at 502

3). it was irrelevant, and inadmissible in accordance with rule 402

4). Even if arguably relevant it should of been mandatory Excluded under rule 403 on Grounds

Although relevant, evidence is not admissible if it's Probative value is substantially outweighed by the danger of unfair prejudice, or confusion of the issues, or of misleading the jury.

Erazo v. State, 144 S.W. 3d APPENDIX 113

5). Tex. Rule of EVID 103 Rulings on Evidence
(d) preventing the jury from Hearing Inadmissible Evidence to the [redacted] extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.

6). Demonstrative evidence can not walk into evidence by themselves. They must be talked into evidence by a witness

Erazo v. State, 144 S.W. 3d at 497.

7). the Probative value of demonstrative evidence that Floats into evidence by itself is virtually nil

Erazo v. State, 144 S.W. 3d at 498.

8). Dolan, Rule 403: The prejudice Rule in Evidence, 49 S. Cal. L. Rev. 220, 226 (1976). In seperating these three goals, professor Dolan states that the First "aims at control by the judge of the information which reaches the fact finder usually the jury, in such a way that the probability of objectively 'correct factual determines is maximized." Id. That is the trial judge should ensure that the jury keeps its eye on the ball" of the litigated issues. and is not misdirected in its focus, thereby [redacted] running a risk of reaching an incorrect result because of misleading or improperly emotionally charged material - with respect to the second goal of actual and perceived justness of the system, rule 403 acts by discouraging the use of reprehensible tactics by counsel, by protecting witnesses from harassment, and by encouraging production of evidence in accordance with the properly expected decorum of a trial." Id at 228 as outlined in Erazo v. state, 144 S.W.3d APPENDIX 114.

9). Admission did affect defendant's substantial rights under TEX. R. APP. Proc. 44.2 (b) see also Brown v. State, 270 S.W.3d 564, 570.

10). Did not replicate the conditions of the traffic infraction and stop, and the scope of the police officer's dash camera which would confuse, and mislead the jury as outlined in Michelena-Orovio, 702 F.2d 496, 499-500.

11). The trial Judge's decision to not exclude the demonstrative evidence on it's own cannot be supported by reasonable argument Erazo v. state, 144 S.W.3d at 500.

12)- The court's decision to exclude the demonstrative evidence on it's own was outside the court's broad discretion to manage the conduct of the trial in accordance with: Tex. Code. Crim. Proc. Ann. art. 2.03 (b), see also Hall v. State, 2009 Tex. App. LEXIS at 4960

(3). Injected Facts harmful to the accused

For the reasons stated above the trial judge had a obligation to exclude the prosecutor's demonstrative evidence on it's own to ensure a defendant is guaranteed a fair trial.

which the trial judge in this case did not because he allowed the prosecutor to create demonstrative evidence.

It is not the gravity of the trial judges error that matters, but that it constitutes a violation of petitioner's right to the expansive protection afforded by the fourteenth Amendment guarantee of fundamental fairness in state criminal proceedings Coleman v. Thompson, 111 S.Ct. 2569.

So this error must be seen as an external factor, i.e., "imputed to the state." (" the constitutional mandate [guaranteeing expansive protection afforded by the fourteenth Amendment's guarantee of fundamental fairness in state criminal proceedings]

(which the trial judge has a obligation to make sure a defendant is guaranteed this at trial). Is addressed to the action of the state in obtaining a criminal conviction through a procedure that fails to meet the standard of due process of law").

For the reasons stated above and in petitioner's objection to Respondent's claim IF, the petition has shown cause and prejudice to excuse the default.

PETITIONER'S TRIAL COUNSEL WAS UNFAIRLY SURPRISED BY THE PROSECUTOR INJECTING DEMONSTRATIVE EVIDENCE AT CLOSING THEREBY PETITIONER CAN SHOW CAUSE FOR FAILURE TO LODGE A PROPER AND TIMELY OBJECTION

To show cause, petitioner must demonstrate that "some objective factor external to the defense impeded counsel's efforts" to lodge timely the appropriate objection in the trial court. Sharp v. Johnson, 107 F.3d at 286.

petitioner can demonstrate that his trial counsel was unfairly surprised by the prosecutor injecting demonstrative evidence at closing. This being the external factor to petitioner's defense counsel which impeded his efforts to lodge timely the appropriate objection.

In order to show cause based off being unfairly surprised by evidence presented by the prosecutor petitioner must be able to prove that he did not possess at the time of trial sufficient information upon which to base a proper objection Sharp v. Johnson, 107 F.3d at 286.

There was no way that petitioner possessed sufficient information at the time of trial upon which to base a proper objection.

There was no [redacted] testimony presented at trial involving cell phones or any similarity between taking cell phone photographs or film.

The prosecutor's demonstrative evidence presented to the jury was not evidence in petitioner's trial.

There was no way possibly that the petitioner would of known that the prosecutor was going to present this demonstrative evidence to the jury. Because of this the prosecutor misconduct must be seen as a Factor external to the defense that impeded counsel's efforts to lodge timely the appropriate objection in the trial. thereby petitioner has demonstrated cause for failure to lodge a proper and timely objection as outlined in Sharp v. Johnson, 107 F.3d at 286.

The magistrate claims that prosecutor's use of her cell phone to demonstrate the limitations of [redacted] police car video cameras, the court concludes that this was done to "Facilitate the jury in proper analyzing the evidence presented at trial so that it may arrive at a just and reasonable conclusion based on the evidence." which he cites Milton v. State, 572 S.W.3d 234, 239.

This argument must fail for the reasons emphasized above there was no testimony at trial involving cell phone[redacted] photographs or Film. The prosecuter's demonstrative evidence was was outside the record see Brown v. State, 270 S.W.3d 564, 570 was not done to propery Facilitate to the jury in properly analyzing the evidence presented at trial so the jury will arrive at a just, and reasonable conclusion based on the evidence alone.

The prosecutor's demonstrative evidence did not replicate the conditions of the traffic infraction and stop, and the scope of the police officer's dash camera which would of confused, and mislead the jury as outlined in Michelena-Orovio, 702 F.2d 496, 499-500.

The prosecutor's demonstrative evidence actually caused confusion of the issues and mislead the jury and made it difficult to extract the kernel of controversy see Erazo v. state, 144 s.w.3d APPENDIX 131. which the kernel of controversy in this case was did the petitioner possess a firearm and did the officer's have probable cause to stop the petitioner.

The magistrate cites milton v. state, 572 [redacted] s.w.3d 234, 239 which actually does not support his argument it actually supports petitioner's cause milton's case was reversed due to the prosecuter improperly presented demonstrative evidence to the jury during the punishment phase of milton's trial the milton court held that it wasn't evidence in milton's case and demonstrative evidence actually made the jury give milton a very lengthy sentence and they didn't base that sentence off the evidence in milton's trial.

The milton court explained that you have to be careful of what type of demonstrative you present to the jury cause you could cause the jury to reach a unjust and reasonable conclusion which is what happened in petitioner's case.

the magistrate claims that there is no support in the record that these objections would have been meritorious ones. In any event, petitioner is unable to establish that any prejudice resulted from counsel's failure to object: petitioner is unable to establish that any prejudice resulted from counsel's failure to object, the trial would have had a different result. Accordingly, the state [redacted] court's denial of this claim was not unreasonable and Federal habeas relief should be denied.

The magistrate has erred because:

1). Had petitioner's attorney objected to this, this objection would clearly have merit. For the reasons emphasized above and below petitioner's trial tactics to not object to the above complained of argument by the prosecutor is so ill chosen as to have permeated the entire trial with obvious unfairness.

Lyons v. McCotter, 770 F.2d 529.

The first reason for not objecting to the above complained of arguments by the prosecutor was not sound because if the petitioner attorney objected. The clearly prejudicial and improper actions by the prosecutor the jury's attention would not have been drawn to it.

Lyons v. McCotter, 770 F.2d 529.

The [redacted] second reason for not objecting also is not sound since the worse possible speculation by the jury would be that was introduction into evidence as a result of the lack of any objection by petitioner's attorney.

Lyons v. McCotter, 770 F.2d 529.

To passover admission of prejudicial and arguably inadmissable evidence may be a strategic decision by trial counsel, to pass over admission of prejudicial and clearly inadmissible evidence has no strategic value and may constitute ineffective assistance of counsel.

Lyons v. McCotter, 770 F.2d 529

. In this particular case, an attorney, exercising reasonable professional judgement, would not fail to objection to the introduction of this demonstrative evidence. see vela v. Estelle, 708 F.2d 954 (pre strickland case) Held that defense counsel who fail to specially object, ask for a curative instruction, or preserve for appeal error as to prejudicial testimony, did not render reasonable effective assistance of counsel.

Had petitioner's attorney objected to the above complained of argument's petitioner would of been entitled to a instruction to disregard, and it would be error if the trial judge did not sustain the objection west v. State, 474 S.W.3d 785, 786.

Had petitioner's attorney objected to the above complained of argument, and the trial judge sustained the objections their is reasonable probability that but for the error the ultimate result would have been different Strickland v. washington, 466 U.S. at 687.

The magistrate claims that the look through doctrine is applicable in this case or that it was not unreasonable for the habeas state court to deny relief.

Even when the Final State court decision "is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." Richter, 562 U.S., at 98, 131 S.Ct. 770. (emphasis added). And before a Federal court can disregard a Final summary state court decision, it "must determine what arguments or theories.... could have supporte[d] the state court's decision;

and then it must ask whether it is possible fair-minded jurist could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this court." Id., at 102 131 S.Ct. 770.

To dislodge the final state court decision a petitioner must prove it involved an unreasonable application of Federal law. And to carry that burden in the face of a final state court summary decision, Richter teaches that the petitioner must show no lawful basis could have reasonably support it. To observe that some reasoned opinions bears no more relevance to the AEDPA analysis than to say that some final state court summary decisions are issued on mondays.

wilson v. sellers, 138 S.Ct. 1188, 1198.

A federal habeas court should look at all the arguments presented in state and federal court and examine the state court record. And a federal court should sustain in a state court summary decision wilson v. sellers, 138 S.Ct. 1188, 1203.

The petitioner has over comed the look through presumption for the reasons stated above because no reasonable basis for the state court to deny relief, it is possible a fairminded jurist could disagree with the state's court's holdings, the final state decision is an unreasonable application of federal law, no lawful basis could have support it. The states materials do not reveal a basis to deny petitioner relief.

The magistrate and the respondent claim that even assuming if it was error by the trial court for failing to exclude the prosecutor's demonstrative evidence on it's own, the prosecutor committed misconduct by creating demonstrative evidence, and petitioner's trial attorney erred by failing to timely and properly object to the prosecutor's demonstrative evidence.

The errors were harmless because petitioner was clearly a convicted felon in possession of a firearm petitioner had the handgun in his waistband.

The fact that the petitioner does not deny is that he was a convicted felon in possession of firearm.

Stone v. Powell, 428 U.S. 465, 490-95 (1976) explains "[e]rrors in adjudicating Fourth Amendment claims are not an exception to stone's bar." which the petitioner is not arguing that the jury improperly adjudicated petitioner's Fourth Amendment claims and because of this petitioner should be entitled to relief.

What the petitioner is arguing is Stone v. Powell, 428 U.S. 465, 490-95 (1976) guarntees that the state will provide a defendant an opportunity for <u>full and fair litigation</u> of a Fourth Amendment claim.

The misconduct commited by the trial court, prosecuter, and petitioner's trial attorney deprived petitioner a fair opportunity to litigate his Fourth Amendment claim. For the reasons emphasized above and because:

The prosecutor's demonstrative evidence did not replicate conditions of the traffic infraction and stop, and the scope of the officer's dash camera which would confuse, and mislead the jury as outlined in michelena - orovio, 702 F.2d 496, 499-500.

The prosecutor's demonstrative evidence actually caused confusion of the issues, mislead the jury and made it difficult to extract the Kernel of Controversy as outlined in Erazo v. State, 144 S.w.3d APPEND IX 131. which the kernel of controversy in this case was the petitioner a convicted felon in possession of a firearm, and did the officer's have probable cause to stop the petitioner

Furthermore the case against the petitioner was weak as Far [redacted] as the legality of the traffic stop is concerned in petitioner's objections to the Respondent's claim 4A in further Support the prosecutor requested the trial court that petitioner's 38-22 instruction to stay out.

The trial court in petitioner's case determined that petitioner has sufficiently raised the issue that a jury could believe or not that the officer had reasonable suspicion to conduct a traffic stop on the petitioner was entitled to the 38-23 instruction and denied the prosecutor's request.

See trial transcripts 137-138 exhibit "38-23"

THE COURT: All right. The defense has made the request for a 38-23 charge. would you like to comment on it, or do you have any other specific charges that you would like as well?

MS. EDWARDS: Judge, we would oppose the request for a 38-23 instruction. It's our understanding that there needs to be a fact issue that's raised in order to justify that instruction.

In the case of madden versus state from 2007 from the court of criminal Appeals, there is some analysis there on whether -- when a true fact dispute that calls for a 38-23 instruction is raised by any potential conflict between what's seen or able to be seen on a video and what testimony is from the officers. That case says that unless the DMAV clearly would have shown the failure to signal if it had happened, then that's what's required in order to raise that fact issue.

Judge, it's the State's contention that that's not the situation here with this DMAV, and that the officers testified about the limited scope of the camera, that it happened out of that scope, and you could not physically see it on the DMAV. It's not a situation where the DMAV would have shown it if it had happened.

The additional thing is, [redacted] whatever fact is disputed has to also be material as to whether the stop was legal or not. In this situation, I believe if there's a fact issue, it's only as to that last traffic violation. We've got uncontested testimony from all three of those officers about running the red light at 38 1/2 and the southbound service road. So the stop is legal based on those. So based on that and based on this Madden case, we would request that the 38.23 instruction stay out.

THE COURT: Having heard the testimony, I feel that Mr. Espersen has raised the issue sufficient in that it's not just a question as to Officer Mason or Officer Stevenson in the last traffic violation. I think the jury certainly could possibly believe factually Officer Fickle or not, particularly in light of the fact that Mr. Espersen has raised the fact that all of his transmission that were called out over the radio were not recorded in any way.

I think in light of the fact that he's called into question the plausibility of the collision and the manner in which it was made, I think a reasonable jury could factually believe that or not believe the officers. So based on that, I think he would be entitled to the 38.23 instruction will be as to the stop, not the arrest. It will be for the reasonable suspicion for the stop to begin with, and they will make that factual determination, and you will argue that fact.

Are there any other charges that the state would like, any other specific things other than that,

MS. REAUD: Judge, we would ask, that if you are going to give the 38.23, that you would take a look at the language in madden in footnote six and consider possibly using that language for the instruction to the jury.

THE COURT: I have a good idea of what. see Exhibit 38-23.

Because of these reasons emphasized above the misconduct committed by the trial court, prosecuter, and petitioner's trial attorney deprived the petitioner a fair opportunity to litigate his fourth Amendment claim by preventing the jury in properly analyzing the evidence presented at trial so that it may 'arrive at a just and reasonable conclusion based on the evidence alone, and not on any fact not admitted in evidence." milton v. state, 572 s.w.3d 234, 239 (Tex. crim. App. 2019). explaining the proper jury argument falls within summation of the evidence, reasonable deduction from evidence, answer to opposing counsel, and pleas for law enforcement.

for the reasons emphasized above the petitioner has shown cause and prejudice to excuse this default as outlined in coleman v. Thompson, 501 U.S. 722, 750.

Petitioner reauests this court if they determine that petitioner has shown cause and prejudice to excuse this default Id. and that if the last court did in fact dismissed this claim based upon a state procedural rule to not apply the adjudication on the merits under AEDPA. Because the last state court relied on a procedural rule, and it's adjudication was not "on the merits" for purposes of AEDPA. As outlined in Fisher v. State, 169 F.3d at 299-300

CLAIMS D-12, [redacted] D-13

The magistrate claims that to obtain relief on his IAAC grounds, petitioner must demonstrate that (1) Appellate counsel's conduct was objectively unreasonably under-then current legal standards, and (2) there is a reasonable probability that, but for Appellate counsel's deficient performance, the outcome of petitioner's Appeal would have been different. He does neither.

The magistrate has erred because:

For the reasons emphasized in petitioner's writ of certiorari for claims A-4, B-6, C-10.

It was error for petitioner's Appellate counsel for failing to brief and raise that trial court erred when he allowed the prosecutor to argue facts not in evidence, that petitioner's trial counsel was ineffective for failing to object to the prosecutor arguing not in evidence.

CLAIMS C-10, [redacted] D-12, D-13

For the reasons emphasized above the petitioner has demonstrated that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. and the "likelihood of a different result is substantial, not just conceivable." as outlined in Richter, 562 U.S. at 112 petitioner has met both prongs of the Strickland test see wong v. Belmontes, 558 U.S. 15, 27.

The state court's application of the strickland Standard was unreasonable as outlined in Richter, 562 U.S. at 101 petitioner's trial counsel actions can not be supported by any reasonable argument that counsel satisfied strickland's deferential standard." Id. at 105

CLAIM E-15

"[e]rror's in adjudicating Fourth Amendment claims are not an exception to Stone's bar." moreno v. Dretke, 450 F.3d 158, 167. which the petitioner is not arguing that the jury improperly adjudicated petitioner's Fourth claims and because of this should be entitled to relief.

what the petitioner is arguing is the errors committed by petitioner's trial attorney, Trial Court, and the prosecutor deprived him of a fair opportunity to litigate his Fourth Amendment claim which Stone v. powell, 428 U.S. 490-95 guarantees that the state will provide an opportunity for full and fair litigation of a Fourth Amendment claim.

If the state afforded the petitioner a fair trial in

, a constitutional sense. which in turn would provide the petitioner a fair opportunity to litigate his Fourth Amendment claim, had the State done this, and then the jury improperly adjudicated petitioner's Fourth Amendment claim then there would be nothing for the petitioner to argue.

However the errors committed by petitioner's trial court, trial attorney, and the prosecutor deprived petitioner a fair opportunity to litigate his Fourth Amendment claim which petitioner has been able to prove in petitioner's objection to Respondent claim 4B, in petitioner's exhibit "38-23" See trial transcripts 137-138 that had petitioner's been properly conducted in a constitutional sense there is a reasonable probability that the jury would of excluded the evidence due to the illegal stop by the officer, and ruled in a verdict in favor of the petitioner.

The errors committed by petitioner's trial attorney, [redacted] the Trial Court, and the prosecutor [redacted] for the reasons emphasized above deprived [redacted] him of a fair opportunity to litigate his Fourth Amendment which Stone v. Powell, 428 U.S. 465, 490-95 guarantees that the State will provide a defendant an opportunity for full <u>and fair litigation of a Fourth Amendment claim</u>.

petitioner was afforded a full oportunity to litigate his Fourth Amendment claim but not a <u>fair one</u> which Stone v. Powell, 428 U.S. 465, 490-95 guarantees the State will provide a defendant a fair opportunity to litigate his Fourth Amendment claim if all the State has to do is provide a defendant a full opportunity to litigate his Fourth Amendment claim [redacted] without

, it being a Fair opportunity to litigate his Fourth Amendment claim than the supreme court's ruling in Stone v. Powell, 428 U.S. 465, 490-95 <u>means nothing</u> and that would involve an unreasonable application of federal law Harrington, 562 U.S. at 100.

For the reasons emphasized above the errors committed by the Petitioner's trial court, trial attorney, and the prosecutor was harmful to the petitioner

For the reasons stated above petitioner has rebutted the state's habeas court's ruling of presumption of correctness by clear and convincing evidence. see Nelson v. Quarterman, 472 F.3d 287. The petitioner has shown that there was no reasonable basis for the state court to deny relief Harrington v. Richter, 562 U.S. 86, and that the court of criminal Appeal's denial of his state habeas application was contrary to clearly established federal law, involved an unreasonable determination of the facts in light of the record. 28 U.S.C.A § 2254 (d) (1, 2); Harrington, 562 U.S. at 100.

CLAIM F-16

The magistrate claims that reasonable jurists could not debate the dismissal or denial of the petitioner's §2254 petition on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. Miller-El, 537 U.S. at 327 (citing slack, 529 U.S. at 484). Accordingly, The undersigned recommends that the court should not issue a certificate of appealability.

The magistrate has erred because;

. The petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253 (c)(2), demonstrated that reasonable jurist would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). the petitioner has shown, at least, 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." Id.

In this case, reasonable jurists could debate the dismissal or denial of the petitioner's § 2254 petition on substantive or procedural grounds, and find that the issues presented are adequate to deserve encouragement to proceed. Miller-El, 537 U.S. at 327 (citing Slack, 529 U.S. at 484).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Frank Brown # 01980921

Date 12-15-21