NO. 21-7836

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

BRUCE EDWARD BINGHAM JR.

PETITIONER

VS.

STATE OF TEXAS

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI

TO THE FIFTH CIRCUIT COURT OF APPEALS

Bruce Edward Bingham, Jr. 2136709
Coffield Unit
2661 FM 2054
Tennessee Colony, TX 75884

4-30-22

QUESTIONS PRESENTED FOR REVIEW

Was the prosecutions remarks regarding the "conscience of the community" and "remorse" prosecutorial misconduct, or allowable argument?

Was trial counsel constitutionally effective when he: failed to make reasonable objections; failed to have the biological evidence independantly tested?

Did the prosecutions failure to turn over a copy of the recorded jailhouse phone call to the defense create a constructive denial of counsel?

Did the prosecution shift the burden of proof onto the defense when they suggested to the jury that the defense could have somehow brought evidence to refute the states claims?

LIST OF PARTIES

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

TABLE OF AUTHORITIES

Petitioner respectfully prays that a writ of certiorari issue to review the judgments below.

OPINIONS

From the Federal Courts

The Opinion of the U.S. court of appeals appears at Appendix G to the petition and is unpublished.

The Opinion of the U.S. District Court appears at Appendix F to the petition and is unpublished.

From the State Courts

The opinion/desicion for the highest state court to review the merits appears at Appendix E to the petition and is unpublished.

The denial of Petitioner's request for discretionary review appears at appendix D to the petition and is unpublished.

The opinion of the Fifth District Court of Appeals for Texas appears at Appendix C to the petition and is unpublished.

The judgment of conviction fromthe 439th DIstrict Court of Texas appears at Appendix B to the petition.

The Indictment of the Petitioner appears at Appendix A to the petition.

STATEMENT OF THE CASE

On December 23, 2015 Mr. Bingham was in an accident in which Mr. Madden was injured and eventually succumed to his injuries. Mr. Bignham, (hereinafter, Petitioner) was charged with with intoxication manslaughter in the 439th Judicial District Court of Rockwall County, Texas. Case No. 2-16-057. Petitioner was also charged with Driving while intoxicated, as a result of the same accident, case No. 2-16-0372. He pled guilty to that offense on June 8, 2017 after the trial for intoxication manslaughter.

Petitioner went to trial on the intoxication manslaughter charge on May 8 through the 12th of 2017. He was convicted and was sentence to sixty (60) years in prison. Timely state appeals and habeas corpus requests were filed and ultimately denied.

Petitioner's direct appeal (No. 05-17-00641-CR) was affirmed on January 26, 2018. A Petitioner for distrcetionary review was filed and was denied on August 22, 2018.

Petitioner's state habeas application was filed on May 29, 2019 and was denied on August 7, 2019 (case No. WR-90,090-01). Petitioner them filed his federal habeas petitioner (2254) on November 14, 2019 (Case No. 3:19-CV-2716) which was denied on May 31, 2021. Petitioner then filed a request for a certificate of appealability with the Fifth Circuit court of appeals on July 6, 2021 (Case No. 21-10612). This was ultimatelt denied on February 23, 2022.

During Petitioner's trial, it was testified to that the Petitioner's blood alcohol level (BAC) was .154 at the time of the in hospital blood draw for the police which was approximately 3-4 hours after the accident. The lab analyst testified that he calculated the BAC level at the time of the accident to have been about .222 to .24. Trial counsel never challenged the blood alcohol level or sought to have the blood that was tested and used for trial, independantly tested.

At the state's closing arguments, they asked the jury to convict the Petitioner as they -the jury- was the "conscience of the community" they also asked the jury to consider whether the Petitioner had expressed any "remorse" in a jailhouse phone

call that the Petititioner had made to his wife around 4 in the morning while he was being booked into the jail. The jury was so moved by this phone call that was played for them at trial, but NOT disclosed to defense counsel, that they asked to hear it again during deliberations. (CR-108) The State never gave the correct context of this call -as being one made 1) while Petitioner was still under the influence, 2) he did not know the extent of Mr. Madden's injuries, and he had not succumbed to them yet, and 3) defense counse was not given a copy of the recording prior to it being played for the jury. Therefore, the jury was allowed to think that Petitioner had no "remorse" for his actions, when Petitioner had no idea the extent of his actions at the time of the phone call. And, trial counsel was unable to provide this to the jury as he too did not know, as he was NOT given a copy of the jailhouse recording prior to trial.

Petitioner has raised on habeas that his rights were violated in at least five issues:

1. That the prosecution engaged in misconduct at closing arguments when they asked the jury to convict the Petitioner as the "conscience of the comunity" and arguing that he showed "no remorse" onthe jailhouse phone call.
2. The the Prosecution had shifted the burden of proof unto the defense to show that the Petitioner was not intoxicated.
3. Trial Counsel was inefective for failing to object to these egregious closing arguments of the prosecution.
4. Trial counsel was ineffective for not having the blood evidence that was used at trial, independantly tested.
5. That the state's failure to turn over a copy of the jail house recorded phone call to the defense prior to it being played/used at trial, created a denial of counsel situation during the punishment stage. (NOT A BRADY CLAIM)

JURISDICTIONAL STATEMENT

Petitioner's Sec. 2254 motion was timely filed, his appeal of the District Court's denial to the Fifth Circuit Court of Appeals (Request for a Certificate of Appealability) was denied on ~~May~~ February 23, 2022. Cause No. 21-10612.

REASONS FOR GRANTING THE WRIT

The Court of Appeals decided a federal question of law that is is conflict with the applicable decisions of the State and the Federal Courts.

The Trial Court, the State Habeas Court, the Federal District Court and the Federal Court of Appeals has decided that the claims raised by the Petitioner have no merit or that he has not proven his claims make the requisite showings, however, many of Petitioner's issues and facts have been misconstrued by the courts, ignoring that the requisit showing has been met.

For example, Petitioner has alleged that the prosecution engaged in misconduct when they asked the jury to act in a vigilanty manner and convict the Petitioner as "the conscience of the community." and asked them to "consider the lack of remorse" he supposedly failed to show on a jailhouse call when he had no idea the victim was going to die and he was still under the influence of the intoxicants. (Ground One)

The facts that support this claim and the applicable Supreme Court case presedent Berger v U.S. , 295 U.S. 78, 88 (1935); Darden v. Wainwright, 477 U.S. 168, 181 (1986); Giglio v U.S., 405 U.S. 105, 154 (1972); Greer v. Miller, 483 U.S. 756, 765-66 (1987) and ~~U~~oS v. Young, 105 S. Ct. 1038 (1985). Also State case law such as: Pennington v. State, 345 S.W.2d 527 (Tex.Crim.App. 1961); Cox v. State, 247 S.W.2d 262, 263-64 (Tex.Crim.App. 1952) (... a statement by the prosecuting attorney as to what people are expecting and what people want... is grounds for reversible error.) (That any particulare punishment is required to satisfy the community.) Cortez v. State, 683 S.W.2d 419, 420-21 (Tex.Crim.App. 1982): (What a "cummunity" wants) Lugo

v. State, 732 S.W.2d 662, 664 (Tex.App. 1987).

All of these state that it is a U.S. Constitutional violation to ask the jury to convict as the "conscience" of the community or to assess a particulare sentence as the same.

How can a court, state or federal, claim that the facts presented here do NOT show that this presedent has been violated? The statements were clearly made to the jury and are on record. See, RR6:23, "You are the conscience of the community" "Did you hear any remorse?" RR7:21-22;

Petitioner avers that both the State and Federal courts have failed to apply this presedent to the facts which show that the Petitioner's federal constitutional rights and U.S. Supreme COurt presedent, have been violated. For these reasons this writ should be granted.

In Petitioner's Ground Two, he has shown that the State of Texas illegally shifted the burden of proof onthe the defense at it closing arguments, in that they told the jury that (sumarrily) that if there was exculpable evidene out there, they should have brought it. (RR6:50, 51).

Again, this type of jury argument is not permisible per State and Federal case law. Mullaney v. Wilbur, 421 U.S. 685, 95 S.ct. 1881 (1975); Lowry v. State, 692 S.W.2d 86, 87 (Tex.Crim.App. 1985) Also, In Re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970).

Petitioner's due process rights were violated with this type of argument which shifted the burden onto the defense to some how undermine the state's evidence. However, the defense has no DUTY to present any evidence to undermine the state's evidence, and the defense NEVER claimed that the Petitioner was not intoxicated.

How the State and Federal Courts can fail to properly apply the applicable state and federal, supreme court presedent to this issue and come to the determination that the facts do not support eh claim is a failure to properly apply the U.S. Supreme Court presedent, and the state Court presedent.

Therefore, Petitioner avers that had the State or Federal courts applied the applicable Supreme Court presedent to the facts, this would clearly show that the Petitioner's claims notbonly have merit -based upon facts and applicable law- but that he has proven a clear violation of his Constitutional rights.

For these reasons Petitioner Bingham, asks this Court to grant the writ.

Further reasons to grant the writ are:

In Petitioner's Grounds Three, Four and Five, he raised arguably meritous claims of Ineffective assistance of cousnel,and that the State created a constructive denial of counsel situation.

In Ground Three, the Petitioner has avered that his trial counsel was ineffective for failing to object to the State's arguments to the jury regarding them being the "conscience of the community" and "remorse" (RR6:23 and RR7:21). Heravers that this failure to object fell below a standard level of performance of trial counsel and that he was harmed by the failure to object and for allowing the jury to take these comments into the deliberations with them, as they have unfairly influenced the jury at deliberations.

Because, again, the state and federal courts have failed to properly apply the argued U.S. Supreme Court presedent that is applicable to this issue, and finding that the facts did not support the claim, this COurt should grant review and the writ.

In Petitioner's Ground Four, He argued again that trial counsel was ineffective for failign to have the blood -that was used at trial- independantly tested, due to the issues with its withdrawal and the State's lab issues of misconduct in prior cases. Again, this claim was found to have no merit, yet the Petitionen has asserted that he has a rights to have biological evidence independantly tested prior to trial and that in this situation, it was ineffective for trial counsel to not have the blood independantly tested. As at trial, the blood alcohol level became a major point.

For these reasons this court should grant the writ. and Review these issues for conformity to the Supreme COurt's previouse rulings.

In Petitioner's Fifth Ground, The Courts have taken this issue out of context and misconstrued it completely. The courts have seem this issue as a Brady (v. Maryland, 373 U.S. 83 (1963)) issue, when although Brady rules apply, it is NOT a Brady claim, and Petitioner has clearly pointed that out.

Petitioner's FIfth Claim is that the State created a constructive denial of counsel by failing to turn over to the defense a jailhouse phone call that was played to the jury at the punishment phase of trial, to the defense prior to trial. Although this did not directly violate Brady, it is Brady material and was very material to the sentencing phase. When it was played at the punishment phase of trial, the jury was NOT told of the context or circumstances surrounding this recorded call, and because defense counsel had never heard it or was not given a copy of it, he was constuctively prevented, by a state action or omission, from being in a possision to defense his client regarding the recording, at the punishment hearing. A constructive denial of counsel. See, Penson v. Ohio, 488 U.S. 75, 109 S.Ct. 346 (1988) and Mickens v. Taylor, 535 U.S. 162, 122 S.Ct. 1237 (2002). Also see, Cone v. Bell, 556 U.S. 449, 469 (2009) (When a State withholds from a criminal defendant evidence that is material to his guilt or punishment, it violates his right to due process of law in violation of the 14th Amendment). The jury was so impacted by this call, they asked to hear it again during deliberations, this evidence was material to punishment.

Again, the State and Federal Courts, have failed to properly apply the applicable SUpreme Court presedent that applies to this issue and has come to the wrong conclusion when the law and the facts again, support=that the Petitioners Constitutional Rights have been violated by the state's inaction, creating a situation when counsel was not able to defend his client at the punishment phase of trial.

For these reasons, this COurt should grant review and issue the writ.

Further reason to grant the writ are:

The U.S. District Court erred in denying Petitioner's claims because its decision is in direct conflict with this Court's decision in cases such as: Berger v. U.S., 295 U.S. 78, 88 (1935); Darden v. Wainwright, 477 U.S. 168, 181 (1986). In that, this Court has stated that these remarks must be scrutinized, yet the state and federal courts have scrutinized nothing. Further, citing these and other Supreme Court presedent, the State courts have held that remarks of this nature: "You are the conscience of the community." (RR6:23) and "You heard for your self. You hear any remorse in there?" (RR7:21-22) in cases such as: Lugo v. State, 732 S.W.2d 662, 664 (Tex.Crim.App.1987)(Community); Cortez v. State, 683 S.W.2d 419, 420-21 (Tex.Crim.App. 1982) (Community); White v. State, 699 S.W.2d 607, 611 (Tex. Crim. App. 1985) (Community); Pennington v. State, 345 S.W.2d 527 (Tex.Crim.App. 1961) (We have frequently held that a statement by the prosecuting attorney as to what people are expecting and what people want... is grounds for reversible error.)

And, The State Courts have overturned cases where the prosecutor's remarks were that the jury is the "conscience of the people of this county and state." see, Brown v. State, 508 S.W.2d 91 (Tex.App. 1974); Whittington v. State, 580 S.W.2d 845 (Tex.App. 1979). If the State court's have previously made these appropriate decisions regarding very similare remarks made by the prosecution in the past, it seems reasonable, that along with the concomittant Supreme Court presedent, that a similare determination of error should have been made in this case. The facts are indistict from these other cases.

Therefore, the State and Federal District Courts have failed to properly apply the appropriate Supreme COurt case presedent, and have made a determination that is in direct conflict with the decisions of this COurt. Thus, this COurt should grant the writ and review these issues.

The Fifth Circuit Court of Appeals erred in denying COA in the District Courts denial of Petitioner's 2254 habeas petition without holding a hearing to resolve the

factual basis for these determiantions. Also the applicable law, which if true, warrants habeas relief and- as the record does- did not "conclusively show" that he could not establish facts warranting relief under Sec. 2254, which entitled the petitioner to a hearing, as here, the record and law applicable to the facts, clearly support and warrant the relief the petitioner is seeking.

Further, the Petitioner urges that the State Habeas court's and the Federal District Court's decisions are erroneous and in direct conflict with this COurt's decisions as explained below.

ARGUMENTS AMPLIFYING REASONS TO GRANT WRIT.

1. The State Habeas courts erred in denying the Petitioner's state habeas application on the basis that his claims were not meritorious. This is false and in direct conflict with this court's presedential holdings.

In Ground One, the Petitioner has raised that the Prosecutions remarks to the jury at closing arguments asking them to convict as the "conscience of the community" and asking them to consider any "remorse" that the Petitioenr may or may not have exspressed in a recorded jailhouse phone call, violated his Constitutional rights to a fair trial and due process.

The State Habeas court denied without written order Petitioner's state habeas application.

The U.S. District Court reasoned that the jury is the "conscience of the community" and therefore, there is no error in arguing so. (Doc. 31, p. 6)

Petitioner also argued that the Prosecution asked the jury "you heard for yourself... you hear any remorse in there?" in reference to a jailhouse receorded phone call to his wife on the night that he was arrested, about 3 a.m. The issue here is 1) that the prosecution would ask the jury to consider any "remorse" at all, and 2) the context of the phone call was never explained tot he jury, and 3) a copy of this call was never given to the defense prior to trial.

Point being, the jury was allowed to consider "remorse" that reasonably was

not there because that call was made at the time of booking, the Petitioner was still under the influence of the intoxicants, and he did not know that the deceased was so seriously injured or would die. To complicate the matter of the "remorse" remark, defense counsel was never gicen a copy of the recorded call prior to trial, therefore he was unable to correct the state's perseption of the call, give it context or explain to the jury why they did not hear any remorse. Fore these reasons, the prosecution violated the Petitioner's rights when the, in bad faith, made this comment regarding "remorse" when they reasonably should have known that at that point, there was no reason to hear any remorse from the Petitioner, as he more likely than not, did not fully grasp the seriousness of the sitation, at that time. Thus, this remark can be seen a a foul blow, when the prosecution reasonably should have recognized it as one.

Because they said it any way, it violated the Petitioner's rights to due process and a fair trial. The State and Federal courts disagree.

Further, in Ground Two, the Petitioner Mr. Bingham, complained that the State shifted the burden of proof on to the defense to show that the Petitioner was not intoxicated. The state and federal courts determined that this type of argument was proper in response to defense counsel's argument . (Doc 31, p. 8)

Mr. Bingham would counter that regardless of what "response" was appropriate, the state never has the right to shift the burden of proof. Even if they acknowledged that they have the burden of proof, to suggest to the jury tha tthe defense "could have brought" some type of evidence and they didn't that in some way counters that state's contentions, shifts the burden of proof onto the defense, in violation of the defendants' constitutional rights.

In Mr. Bingham's Ground Three, he claims that trial counsel failed to object to the prejudicial remarks made by the prosecution as argued above. Because the court's determined that the prejudicial remarks were allowable, they have claimed that Mr.

Bingham has not met his burden under Strickland. (Doc 31, p. 9-10) Petitioner would argue that reasonable jurists would debate whether counsel of reasonable competance would have objected or not. It seems reasonable that trial counsel would object to prejudicial remarks, therefore, under the strickland standard set by this court, when trial counsel failes to make reasonable objections, he provideds deficient representation.

The current state habeas standard for a failure to object claim is whether or not the trial court would have committed error in overruling such an objection. Ex Parte White, 160 S.W.3d 46 (Tex.Crim.App. 2004). However, this standard is NEVER taken into account when the state court's are assessing a failure to object claim. In this case Petitioner had asserted that the trial court would have committed error if it had overruled such an objection since there is a plethora of case law stating that this type of argument is impermissible. See. e.g., Pennington v. State, 345 S.W.2d 527 (Tex.Crim.App. 1961); Cox v. State, 247 S.W.2d 262, 263 (Tex.Crim.App. 1952); Sinisterra v. U.S., 600 F.3d 900, 910 (8th Cir. 2010)(statement by prosecuting attorney as to what people are expecting or what people want.. is grounds for reversible error.)

Further, there is specific case law prohibiting statements to the jury such as "conscience of the community" or "Conscience of the people of this county and state." Brown v. State, 508 S.W. 2d 91 (Tex.App. 1974); Whittington v. State, 580 S.W. 2d 845 (Tex.App. 1979); U.S. V. Fleming, 667 F.3d 1098, 1101 (10th Cir. 2011). There are many more cases that say the same thing from both the state courts and the federal courts. The point being, the habeas courts are failing to apply the proper standard to the claim which is valid, that, trial counsel is in deed ineffective for failing to object to the state making improper statements, and the test is whether the trial court would have committed error in overruling such an objection, not whether the outcome of the trial could have been different apart fromthe error. (Doc. 31. p. 9)

What's more, the same argument falls to the claim of the remark regarding the "remorse" that the Petitioner failed to show. There is again, multiple case laws that put forth that it is an improper argument, and perhaps a comment of the defendant's

failure to testify when the state refers to "any remorse shown" by the defendant. See, e.g., Andrade v. State, 246 F.3d 217 (Tex.Crim.App. 2007); Hall v. State, 13 S.W. 3d 115, 117 (Tex.Crim.App. 2000); Ex Parte Lane, 303 S.W.3d 702 (Tex.Crim.App. 2009); U.S. V. Williams, 358 F.3d 956, 964-65 (D.C. Cir. 2004); Gochicca v. Johnson, 118 F.3d 440, 447 (5th Cir. 1997); Westley v. Johnson, 83 F.3d 714, 723 (5th Cir. 1996): and Griffin v. California, 380 U.S 609 (1965).

Therefore, the objection to these comments were valid and the trial court would have committed error if it had over ruled the objection, what part of "met the standard" did the state and federal courts miss? Clearly the facts and law support that the trail court would have commited error had it overruled such an objection. Therefore, by failing to make such an objection trial counsel met the standard for ineffective assistance of counsel. Why was relief denied?

In Ground Four, Petitioner had raised that trial counsel was inefective for failing to have the blood draw that was used at trial -the second set of vials- independantly tested. This so as to 1) ensure that the states lab tests were valid and not false in some misleading way, and 2) possibly provide fodder for argument that the state had falsified the lab results or were misleading the jury in some way, or with a different set of BAC numbers, argue some level of mitigation.

However, by failing to have the blood evidence that was used at trial independantly tested, trial cousnel allowed the state carte blanche with the evidence so as to argue what ever they wanted without any means to test or challenge that argument.

The State and Federal courts have claimed that the argument is without merit without showing that some different result would have been available. Howver, that is not the claim. The claim is any reasonable attorney would have sought to to have the biolgical evidence independantly tested as an advocate for his client and in an effort to shallenge the states case.

Further, the Petitioer had the right to have this evidence independantly tested under Ake v. Oklahoma, 470 U.S. 68 (1985) and Williams v. State, 958 S.W.2d 186, 194

(Tex.Crim.App. 1997).

There is no way for the Petitioner to have shown what additional testing would have shown, as the courts seem to demand. The point here is, is it not unreasonable that when the state is presenting biological evidence, that trial counsel whould be remiss for failing to have the evidence independantly tested? Petitioner asserts so. Who is right? And, how can a petitioner present evidence to the habeas courts that does not exist? Should that defeet the claim?

Mr. Bingham asserts that trial counsel was inefective for not advocating for hims by failing to have the blood evidence independantly tested.

In Petitioner's Ground Five, he claimed that the states failure to turn over a copy of the jailhouse recorded phone call to defense prior to trial created a constructive denial of counsel claim. Becasue, when the state played tha tape recording at the punishment phase of trial, trial counsel was suprised and unprepared to defend against or mitigate the effects of the recording, which of course, the state took out of context.

Although NOT argued as a Brady claim, the state and federal courts assumed it to be one. Petitioner on multiple occasions asserted that he had NOT raised a Brady claim but a constructive denial of counsel claim, because the failure to disclose prevented the defense from defending agaisnt the recording. The COurts simply claim that this argument lacks merit. (Doc 31. p. 11). However, Petitioenr would counter that, how can a claim lack merit when case law and supremem court presedent support the argument?

Specifically, as argued, the failure to disclose the jailhouse recorded conversation between the Petitioner and his wife, on the morning of his arrest, while he was still under the influence of the intoxicants, and had not idea of the severity of the accident, allowed the state to take the recording out of context before the jury, and prevented the defense from correcting this context or mitigating it harm effectively created an "official interference with the defense" Gochicoa v Johnson, 238 F.3d 278, 284 (5th Cir. 2000). The state had a duty to turn over a copy of this

jailhouse recording (Brady v. Maryland, 373 U.S. 83 (1963)). However, because the evidence was discoverable through due diligence of trial counsel -and he failed to do so/be diligent- petitioner did not assert a Brady claim. U.S. v. Brown, 650 F.3d 581, 588 (5th Cir. 2011).

Intsead, the facts support that because they failed to provide a copy of the recording to the defense, that act created an official interference with the defense and prevented the defense from subjecting thise evidence to any meaningful adversarial testing. Gochicoa v. Johnson, 238 F.3d 278, 284 (5th CIr. 2000).

Thus, the facts support the claim as argued and the state and federal courts have failed to properly adjudicate the claim. Instead, they have truned it into a meritless Brady claim, one which the petitioenr had not asserted.

CONCLUSION

For these reasons, and the fact that the Petitioner's constitutional rights were not protected through the state habeas adjudication nor the federal habeas adjudication of his claims, that this Honorable COurt would pisk up the slack created by the U.S. Legislature and force the states to start protecting the rights of its citizens in a habeas corpus context.

Petitioner's facts and the record support the asserted claims he has put forth in his state and federal habeas petitions, however, the habeas corpus system of adjudication has failed him, as it does many. The state and federal courts are failing to properly apply this court's presedent or apply the appropriate standards of review to the claims presented, therefor makign the habeas process a due process failure.

Petitioner asks this court to issue the writ of certiarari and call for argument on the claims.

Respectfully submitted,

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