

No. 22-5100

ORIGINAL

Supreme Court, U.S.
FILED

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IN THE
SUPREME COURT OF THE UNITED STATES

JOSHUA ERIC TOWNLEY — PETITIONER
(Your Name)

vs.

BOBBY LUMPKIN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

MR. JOSHUA ERIC TOWNLEY - 02118495 - PRO SE
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SUPREME COURT, U.S.

QUESTION(S) PRESENTED

1. Is there a constitutional claim of double jeopardy, reinstatement of convictions after acquittal, when a Federal or State trial court rescinds its granted order of new trial based on insufficient evidence of guilt?

2. Has The Supreme Court of the United States overturned its own precedent in *Burks v. United States*, 98 S.Ct. 2141 (1978) or *Hudson v. Louisiana*, 101 S.Ct. 970 (1981)? Where this Court holds that if the conviction is reversed for insufficient evidence of guilt, double jeopardy bars retrial; Because a finding of insufficient evidence of guilt means that the trial court should have entered a judgment of acquittal; Where this principle applies to state as well as federal prosecutions.

3. Has The Supreme Court of the United States overturned its own precedent in *Buck v. Davis*, 137 S.Ct. 759 (2017) allowing a United States Court of Appeals to exceed its statutory authority under 28 U.S.C. § 2253 (c)(1)(A), by considering the merits of a constitutional claim without jurisdiction, while determining the reasonable debatability of that claim?

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:

RELATED CASES

- STATE OF TEXAS V. JOSHUA ERIC TOWNLEY, CR16-0115, 43rd JUDICIAL DISTRICT COURT, PARKER COUNTY, TEXAS. JUDGMENT ENTERED February 16, 2017 (consolidated with this case, CR16-0114).
- STATE OF TEXAS V. JOSHUA ERIC TOWNLEY, NO. 02-17-00047-CR, SECOND COURT OF APPEALS, FORT WORTH, TEXAS. JUDGMENT ENTERED March 9, 2017 - DISMISSED; MARCH 16, 2017 - REINSTATED; October 11, 2018 - AFFIRMED. (appeal number).

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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 FEBRUARY 17, 2022.

☐ 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: MARCH 18, 2022, and a copy of the order denying rehearing appears at Appendix C.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from state courts:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

THE FIFTH AMENDMENT :

No person shall be held to answer for a Capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the Land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of Life or Limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of Life, Liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

THE FOURTEENTH AMENDMENT :

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of Life, Liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the Laws.

28 U.S.C. § 1254(1) :

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods - By writ of certiorari granted upon the petition of any party to any civil or criminal case, before

or after rendition of judgment or decree.

28 U.S.C. § 2253 (c)(1)(A) •

Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from — the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;

28 U.S.C. § 2254 (a) •

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254 (d) •

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim — resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented

in the State court proceeding.

Texas Rules of Appellate Procedure, Rule 21.3(h).

SECTION TWO - APPEALS FROM TRIAL COURT JUDGMENTS AND ORDERS

TRAP 21. NEW TRIALS IN CRIMINAL CASES.

21.3. GROUNDS. The defendant must be granted a new trial, or a new trial on punishment, for any of the following reasons - (h) when the verdict is contrary to the law and the evidence. (only means of challenging the sufficiency of the evidence).

STATEMENT OF THE CASE

On the 16th day of February, 2017, Mr. Townley was found guilty of Cause CR16-0114, Count I and NOT GUILTY on Count II. He was found guilty on Cause CR16-0115, sole count, and sentenced to stacked life sentences. Mr. Townley timely presented a motion for New Trial. (D-2-4; 8-14)

On the 22nd day of February, 2017, Mr. Townley timely filed a Notice of Appeal and a Combined Motion for New Trial challenging the sufficiency of the evidence to support or maintain his convictions. The State did not move against the motion, on the ground that the verdict is contrary to the law and the evidence. TRAP R 21.3(h).

On the 24th day of February, 2017, the trial court considered and granted Mr. Townley's Motion for New Trial, in chambers, with written order and paper hearing. (D-5)

On the 27th day of February, 2017, the Granted Order was

filed in the 43rd Judicial District Court via electronic means and subsequently filed in the Second Court of Appeals via electronic means. The State did not controvert the Granted Order. (T.C.C.P., Art. 44.01(a)(3)).

On the 9th day of March, 2017, the Second Court of Appeals dismissed Mr. Townley's appeals as 'moot' due to the Granted Order and emailed all parties on the 10th. (E-1-5)

On the 10th day of March, 2017, upon receipt of the First Opinion and Judgments, the trial court filed its order amending the previous order rescinding it and reinstated Mr. Townley's convictions as being 'erroneously and unintentionally' granted. The trial court had allegedly filed this rescinding order on the 27th day of February by means of an analog rubber settable stamp in the district court and then filed it by electronic means in the Second Court of Appeals. (F-1-3)

On the 16th day of March, 2017, the Second Court of Appeals reinstated Mr. Townley's appeals due to the rescinding order of the trial court, 'unbeknownst' to them.

Between March 16th and on or about the 8th day of December, 2020, Mr. Townley diligently pursued his Liberty Interests by way of Direct Appeal, PDR, Writ of Certiorari, and State Habeas Corpus. See Habeas Record.

On or about the 8th day of December, 2020, Mr. Townley timely filed a Meritorious 28 U.S.C. § 2254. In his Motion, He particularized that the State trial court violated the Double Jeopardy Clause of the Fifth Amendment when, rescinding its

post-verdict grant of a new trial based on insufficiency of the evidence, it reinstated his convictions.

On the 19th day of January, 2021, a Show Cause Order was executed by Federal District Judge Mark T. Pittman; the same judge who, as a Second Court of Appeals Justice, affirmed Mr. Townley's convictions.

On the 18th day of June, 2021, the district court issued its order to deny Mr. Townley's § 2254 without a de novo review addressing the merits of his constitutional claim on a question of law, deferring to the presumption of correctness. (B)

On or about the 21st day of September, 2021, Mr. Townley timely filed a motion in the U.S. Court of Appeals, Fifth Circuit, seeking the issuance of a Certificate of Appealability and Informa Pauperis.

On the 17th day of February, 2022, the Court of Appeals issued an order to deny Mr. Townley's Motion on Informa Pauperis because he had paid the requisite \$505 filing fee and Certificate of Appealability. (A)

On the 18th day of March, 2022, the Court of Appeals denied Mr. Townley's timely filed Petition for Panel Rehearing and/or Rehearing En Banc. (C)

Mr. Townley now seeks a Writ of Certiorari from this Honorable Court.

REASONS FOR GRANTING THE PETITION

FOREWORD

~ SEMPER AVANTI ~

I am one of among thousands of American Citizens who find themselves either in Federal or State prosecutions. We are Veterans, First Responders, People of Color from all nationalities that make up this Great Nation. We are Professionals. We are Husbands, Wives, Fathers, Mothers, Sons and Daughters. We are the Backbone of this country caught up in the Labyrinth of the American Criminal Justice System or Mass Incarceration. Where a person is socially adjudged guilty, stripped of their inalienable rights to Due Process and Equal Protection of the Law, all while trying to prove our legal innocence; disavowed due to our ignorance of the Law; AEDPA 2.0. - for the 21st Century.

We mostly represent ourselves with no formal training in the reading and science of law. We are 'pro se', indigent, incarcerated litigants fighting a System with outdated tools; our own resources - which are minimal at best; with extremely limited access to legal resources engaged with two or more 'Professional Lawyers' with abundant, inexhaustible resources. We are held to a lawyer's standard, mocked, or even ridiculed for bringing cases to trial - the embodiment of the 6th Amendment. We are affirmed on False Summaries of Fact, beginning at the Trial and Appellate levels, taken as 'truth' to the next level of review.

We are denied without written order, "white carded", with absolutely no explanation as to why we were denied. We are shunned, out-cast, ignored, and swept under the legal carpet in 'Courts of Law'. The very definition of 'Miscarriage of Justice' - \$505 for a Rubber Stamp - in Our Second Highest Courts.

Although we have been given United States Supreme Court Precedent to guide and assist us in our futile endeavors, *Haines v. Kerner* and *Lewis v. Casey*, to give the 'Little Guy' a fighting chance; these precedents are largely ignored by the 'Legal Professionals'. These Professionals, some not even bar admitted to practice, are more politically driven in today's atmosphere of a red or blue who's who in higher circles, who get promoted to advance the tyranny of the 'For Profit' engine that has become known as Criminal Justice in America, that is more akin to 'Just Us'. A modern day Greek Classic of Prose and Tragedy. If you have the 'Assets' we can find you 'NOT GUILTY'.

I, representing thousands, just want a fair shake of the LAW as it stands. If the Law states that a de novo review is in order on a question of law, *Shute v. Texas*, then that is what should take place no matter what is 'argued' behind it. The State does not get a Presumption of Correctness, *Miller v. Fenton*, stating that sufficiency of the evidence was not challenged, when in FACT it was and that Burks, Greene and Hudson were not 'Triggered' in the process that followed because the State claims

that - In the Interest of Justice - is/was a second ground, 'A Fatal Flaw in Petitioner's Argument'. Is not that 'Judicial Authority'?

I was acquitted by a trial court or a Jury's verdict or guilt when that same court granted my motion for new trial based on the insufficiency of the evidence. He rescinded his order 15 days later when the Second Court of Appeals of Texas dismissed my appeals as 'moot'. He reinstated my convictions without jurisdiction, in violation of the Double Jeopardy Clause, under *Hudson v. Louisiana* or the *Burks Double Jeopardy Principle*.

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of Justice and the rule of law. Judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law. An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and should personally observe those standards so that the integrity and independence of the judiciary is preserved.

This is exactly what our Federal System was founded on - Our 'Aphesis' - Our Freedom from Tyranny. I am a U.S. Navy Submarine Veteran, I am a 9th generation Irish-American, I am a Son of the Revolution and a Son to One, I am a Father of Three, I am a Twice Past Master of a Blue Lodge of Texas, I am Pro Se and Indigent. I have been Professional in my understanding of the Law and presentation to the courts. I have been actively pursuing my Freedom following the Rules of a Failed System. I am still an American Citizen entitled to my Constitutional Rights I have defended.

There is a reason why 'Lady Justice' is blind folded, for if she could see what has happened to Her System, she would drop her Scales and take up her Sword to cut the Head off of the Snake of this For Profit Engine that became 'JUST US'.

I am Humbly requesting a call for an exercise of this Honorable Court's Supervisory Power over a Federal Question that should be settled by this Court to remove all doubt amongst the Lower Courts including the States. I now present my Questions and Arguments.

1. [Question One] Is there a constitutional claim of double jeopardy, reinstatement of convictions after acquittal, when a Federal or State trial court rescinds its granted order of a new trial based on insufficient evidence of guilt?

A. The trial court rescinded its granted order after the Second Court of Appeals of Texas dismissed the appeals as 'moot' due to the granted order, claiming he granted it 'erroneously and unintentionally'. He reinstated the convictions. The appeals were reinstated. (Appendices D, E, and F).

The appellate court affirms the convictions, acknowledging Hudson but not applying it, because the court stated that a challenge to the sufficiency of the evidence was not initiated by appellant. That a second ground, 'in the interest of justice', was included. That a trial court could rescind its new trial order any time it chose to do so. (Appendix G).

The Texas Court of Criminal Appeals refused and denied without written order on their own independent review - no opinion given.

The United States District Court gave the State presumption of correctness on a Double Jeopardy Claim, a question of law, stating that Burks, Greene and Hudson were not 'Triggered' and that a second ground of 'in the interest of justice' was a 'Fatal Flaw' in Appellant's argument. It denied Appellant his § 2254 writ of Habeas Corpus without a de novo review of the constitutional claim of Double

Jeopardy. (B)

The United States Court of Appeals for the Fifth Circuit denied the Motion for a Certificate of Appealability on this Constitutional claim of Double Jeopardy claiming, on the merits, that there was not a substantial showing, without having jurisdiction with a subsequent denial of the Petition for Panel Rehearing / Rehearing En Banc. (A and C)

There is a violation of the double jeopardy clause when a trial judge grants a new trial motion on the ground that the evidence is insufficient to support a jury's verdict of guilty and then involves the defendant in a subsequent prosecution involving the same offenses).

The Double Jeopardy Principle expounded in *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141 (1978) held that "the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient" to support the guilty verdict. *Id.*, at 18.

In *Hudson v. Louisiana*, 450 U.S. 40, 101 S.Ct. 970 (1981) the question was whether Louisiana violated the Double Jeopardy Clause as expounded in *Burks*, by prosecuting Hudson a second time after the trial judge at the first trial granted Hudson's motion for new trial on the ground that the evidence was insufficient to support the jury's verdict of guilty. *Hrs*

motion for new trial, challenging the sufficiency of the evidence, according to Louisiana's Code of Criminal Procedure, Art. 851(1) stated, "The verdict is contrary to the law and the evidence" Hudson was held to be controlled by Burks applied to the States under *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151 (1978). Hudson was reversed and remanded with a judgment of acquittal.

In Mr. Townley's case, the question is whether Texas violated the Double Jeopardy Clause as expounded in Hudson, by reinstating Mr. Townley's convictions, after the trial judge had granted his motion for new trial on the ground that the evidence was insufficient to support the Jury's verdicts of guilty then rescinded it - a subsequent prosecution.

Mr. Townley's motion for new trial challenging the sufficiency of the evidence was according to Texas Rules of Appellate Procedure Rule 21.3(h) which states: "The defendant must be granted a new trial, or a new trial on punishment, for any of the following reasons: ... (h) When the verdict is contrary to the law and the evidence." Appendix D-2-5.

The State contends that Burks, Greene and Hudson were not invoked, 'Triggered', when the trial court granted then rescinded its granted order reinstating Mr. Townley's convictions. The State

accorded *Kirk v. State*, 454 S.W. 3d 511, 515 (Tex. Crim. App. 2015), "that the trial court has the power to rescind its order granting a new trial and time alone does not limit this power," as its controlling authority.

The State disregards The Texas Court of Criminal Appeals holdings in: 1) *Moore v. State*, 749 S.W. 2d 54, 58 (Tex. Crim. App. 1998), overruled in part, *Awadelkarim v. State*, 974 S.W. 2d 721 (Tex. Crim. App. 1998), that "the Double Jeopardy Clause... bars any retrial of a case once a judge grants a motion for new trial based solely on insufficiency of the evidence. Once the trial judge grants a motion for new trial based solely on insufficiency of the evidence, the only further action permitted by the Double Jeopardy Clause is the entry of a judgment of acquittal." *Moore* cites *Burks* and *Hudson* as controlling. See Appendix G, 3-8, referencing Appellant's Brief, pp 11-20 (Ground one).

2) *State v. Savage, III*, 933 S.W. 2d 497, 503 (Tex. Crim. App. 1993), "In *Moore v. State*, 749 S.W. 2d at 59 [T.C.C.A.] held that once having granted a motion for new trial based on legally insufficient evidence, the trial court lost "jurisdiction" to do anything except enter a judgment of acquittal." Both cases concern *Garcia v. Dial*, 596 S.W. 2d 524, 528 (Tex. Crim. App. 1980) (panel opinion) (concerning jurisdiction); and

3) *State v. Moreno*, 294 S.W. 3d 594, 598 (Tex. Crim. App. 2009), "When a trial ends, after jeopardy has attached, with a judgment of acquittal, whether based on a jury verdict or not

guilty or on a ruling by the court that the evidence is insufficient to convict, any further prosecution, including an appeal, is prohibited by the Double Jeopardy Clause."

The State contends, through its appeals court in its Brief Summary of the Facts, Appendix G at 3, that Mr. Townley did not "Challenge the sufficiency of the evidence to support his convictions." This is an erroneous presumption of the facts raised by Mr. Townley. This challenge was raised in his motion for new trial, Appendix D: 2-4, where the trial court considered without a hearing and subsequently granted the motion, Appendix D: 5. (showing judicial reasoning). The appeals court insists that Hudson does not apply because Mr. Townley raised a 'second' ground or 'in the interests of justice' - hair splitting - which Mr. Townley holds and understands as 'in accordance with the law' - a trial court's authority to act (to grant or deny a motion for new trial).

The very principle of the Double Jeopardy Clause, decoded in *Burks*, held in *Moore*, was distinguished in *Rodriguez v State*, 852 S.W.2d 516, 519 (Tex. Crim. App. 1993). The State remains under *Kirk*, 454 S.W.3d at 511 n.1. "Thus, *Moore*'s continued validity for the proposition that a trial court cannot rescind an order granting a new trial solely on the basis that legally insufficient evidence supports

the verdict is unclear." The Kirk court did not address this ability of the trial court to rescind such order, effectively side-stepping or even ignoring the validity of The United States Supreme Court Precedent held in *Burks* applied to the States under *Hudson*. Therefore, an updated Holding is in order from this Court to re-affirm this Principle under Double Jeopardy.

The United States District Court decided in two weeks the outcome of Mr. Townley's 28 U.S.C. § 2254 Writ of Habeas Corpus. A Meritorious Constitutional Claim of Double Jeopardy on a Show Cause Order - that a violation of the Constitution had occurred by (a) the State court judgment and that that judgment was (d) contrary to Supreme Court Precedent. 28 U.S.C. § 2254. It denied Mr. Townley's writ, siding with the State court, that the precedents of *Burks*, *Greene* and *Hudson* were not 'Triggered' because it claimed that "in the interest of justice" was a second ground in the motion for new trial, a 'Fatal Flaw' in Mr. Townley's argument. Ignoring Fifth Circuit Precedent without a de novo review of a question of law. Appendix B.

Shute v. Texas, 117 F.3d 233 (5th Cir. 1997) states: "A double jeopardy claim is a question of law. *U.S. v. Chuck*, 87 F.3d 138, 140 (5th Cir. 1996) (per curiam). In a habeas context, review of the district court's determination of law is de novo. *Dison v. Whitley*, 20 F.3d 185, 186 (5th Cir. 1994). Generally if a defendant obtains a reversal of his convictions, double jeopardy

does not bar a retrial. *United States v. Ball*, 163 U.S. 662, 671-72, 16 S.Ct. 1192 (1896). If the conviction is reversed for insufficient evidence of guilt, however, double jeopardy does bar retrial. This is because a finding of insufficient evidence of guilt means that the trial court should have entered a judgment of acquittal, which would have barred retrial. *Burks v. United States*, 437 U.S. 1, 18, 98 S.Ct. 2141, 2147 (1978). This principle applies to state as well as federal prosecutions. *Hudson v. Louisiana*, 450 U.S. 40, 42 n.3, 101 S.Ct. 970 (1981). For double jeopardy purposes, a lesser-included offense is considered to be the same crime as the greater offense. *Harris v. Oklahoma*, 433 U.S. 682, 682-83, 97 S.Ct. 2912 (1997) (per curiam). See also *Donatone v. Cain*, 231 F.3d 1000, 1005 (5th Cir. 2000) (double jeopardy bars retrial following reversal for insufficient evidence).

In reviewing a claim of insufficient evidence, it must be determined whether, "viewing the evidence" in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Dupuy v. Cain*, 201 F.3d 582, 589 (5th Cir. 2000) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781 (1979)). *Jenkins v. State*, 493 S.W.3d 583, 599 (Tex. Crim. App. 2016) (Standard of Review for Sufficiency of the Evidence). *Brooks v. State*, 323 S.W.3d 893, 894-95 (Tex. Crim. App. 2010) (mandating *Jackson*). To apply this standard, the Fifth Circuit looks to the elements of the

Offenses as defined by State substantive law. *Miller v. Johnson*, 200 F.3d 274 (5th Cir. 2000); *Foy v. Donnelly*, 959 F.2d 1307 (5th Cir. 1992). The Fourteenth Amendment Standard.

The State reasoned, in unreasonable applications of law, that the Double Jeopardy Clause is not invoked in Mr. Townley's case and that the trial court is entitled to rescind its order whenever it chooses to do so in complete disregard for the law as applied, without having jurisdiction. Mr. Townley believes this to be contrary to clearly established Federal law, as determined by the Supreme Court of the United States. 28 U.S.C. § 2254 (d).

Within the body of Mr. Townley's motion for new trial lies the holding found in *Hudson* of the *Burks* Principle. *Hudson*, as applied to Mr. Townley's case, is absolutely clear in that the trial judge granted the new trial motion because the State had failed to prove its case as a matter of law, there are no significant facts that distinguish this case from *Hudson* and the Double Jeopardy Clause bars the State from prosecuting Mr. Townley a second time by reinstating his convictions on a void rescinding order lacking jurisdiction, after the trial court itself effectively granted Mr. Townley acquittals, in Cause Numbers CR16-0114 and CR16-0115, based on the insufficiency of the evidence during its consideration and review of the new trial motion. (D-2-5)

2. [Question Two] Has The Supreme Court of the United States overturned its own precedent in *Burks v. United States*, 98 S.Ct. 2141 (1978) or *Hudson v. Louisiana*, 101 S.Ct. 970 (1981)? Where this Court holds that if the conviction is reversed for insufficient evidence of guilt, double jeopardy bars retrial; Because a finding of insufficient evidence of guilt means that the trial court should have entered a judgment of acquittal; where this principle applies to State as well as federal prosecutions.

A. The State contends that this principle does not apply in this case due to there being two grounds in Mr. Townley's Motion for New Trial. 1) When the verdict is contrary to the law and the evidence (a sufficiency challenge) and 2) in the interests of justice (a trial court's authority to act).

The State Appeals court states that 1) There was no challenge to the sufficiency of the evidence to support the convictions (G-3); 2) there were two grounds in the motion (G-3-8); and 3) that this principle does not apply because the trial court can rescind its granted order whenever it chooses to do so.

The Texas Court of Criminal Appeals says nothing in a refusal/denial without written order based on the previous findings of the appeals and trial courts and their alleged independent review - 'white carded' - Satisfying the requirements of *Picard v. Connor*.

The United States District Court states that the presumption of correctness of the State's facts are in order - on a question of Law - and that Burks, Greene, and Hudson are not 'Triggered' due to a second ground - a 'Fatal Flaw' in Mr. Townley's argument.

The United States Court of Appeals, FIFTH CIRCUIT, denies Mr. Townley's Certificate of Appealability of the District Court's Opinion and Order without a de novo review on a question of Law. Ruling on the merits of a Meritorious Claim of Double Jeopardy without first granting a certificate for appeal, stating that a substantial showing of the denial of a Constitutional right was not met. Ignoring the threshold analysis of the reasonable debatability of that claim.

Mr. Townley's due diligence and understanding of the law is clear. Having shepardized Both Burks and Hudson, the precedent held in these two cases alone have not been overturned in the forty-four and forty-one years of their existence. The progeny afforded in nearly all Circuit Courts of Appeals and District Courts of Common Law trickling down to the State Courts, as applied, are just as effective as they were all those years ago. Mr. Townley believes, in his understanding, that it is more of a direct application issue upon the various courts and professionals of clearly established Federal Law not being correctly adhered to based on their own interpretation of a

Principle that has been clearly established by this Court of Constitutional Law under the Fifth Amendment of the Double Jeopardy Clause, made fully applicable to State as well as Federal prosecutions.

To reiterate, there is a violation of the Double Jeopardy Clause when a trial judge grants a new trial motion on the ground that the evidence is insufficient to support a Jury's verdict of guilty and then involves the defendant in a subsequent prosecution involving the same offenses.

The Double Jeopardy Principle expounded in *Burks*, 437 U.S. at 18, held that "the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient" to support the guilty verdict. The questions here are 1) did the trial court grant Mr. Townley's Motion for New Trial based on the insufficiency of the evidence with written order (functional acquittals)?; 2) did the appeals court, in reviewing that order and the case 'in accordance with the law', dismiss the appeals as 'moot' due to the granted order affirming acquittals?; and 3) did both the trial court and the court of appeals violate the double jeopardy clause by rescinding its granted order, without jurisdiction, placing Mr. Townley in a subsequent prosecution, by reinstating his convictions and subsequently his appeals being affirmed, standing on

no challenge to the sufficiency of the evidence?

In Hudson, 450 U.S. at 42, the question was whether Louisiana violated the Double Jeopardy Clause as expounded in Burks, by prosecuting Hudson a second time after the trial judge at the first trial granted Hudson's motion for new trial on the ground that the evidence was insufficient to support the jury's verdict of guilty. Mr. Townley's ground is verbatim of Hudson's challenging the sufficiency of the evidence - "The verdict is contrary to the law and the evidence." Hudson was controlled by Burks. Hudson was reversed and remanded with a judgment of acquittal. Should not Mr. Townley's also?

The question for the Court then; was Mr. Townley placed in a subsequent prosecution after the trial court granted his motion for new trial based on the insufficiency of the evidence, a functional acquittal, when the trial court rescinded its granted order and reinstated Mr. Townley's convictions? The Burks Principle which controlled Hudson should also control Mr. Townley's case - the Double Jeopardy Clause precludes the subsequent prosecution or the reinstatement of convictions after an acquittal. A final action of the trial court's entry of judgments - acquittals.

This is a matter that this Court's Supervisory Power should decide. It is not the unreasonable applications

that are accorded to the State courts or clearly established Federal law, being correct by a United States District Court and Circuit Courts of Appeals. This decision is far more advanced than an isolated case. This case is one example that is taking place across this Nation, at both levels of prosecution. Now is the time to reaffirm the Burks Precedent that has been established in this Constitutional Principle of Constitutional Law.

Within the body of Mr. Townley's motion for new trial lies the holding in Hudson. Hudson, as applied to Mr. Townley's case, is absolutely clear in that the trial judge granted the new trial motion because the State had failed to prove its case as a matter of law, there are no significant facts that distinguish this case from Hudson and the Double Jeopardy Clause bars the State from prosecuting Mr. Townley a second time by reinstating his convictions on a void rescinding order lacking jurisdiction.

3. [Question Three] Has The Supreme Court of the United States overturned its own precedent in *Buck v Davis*, 137 S.Ct. 759 (2017) allowing a United States Court of Appeals to exceed its statutory authority under 28 U.S.C. § 2253 (c)(1)(A), by considering the merits of a constitutional claim without jurisdiction, while determining the reasonable debatability of that claim.

A. The United States Court of Appeals, Fifth Circuit, denied Mr. Townley's Motion for Certificate of Appealability stating that a substantial showing of the denial of a constitutional right has not been made, ignoring the threshold analysis of 'reasonable debatability'.

Mr. Townley claimed in his Section 2254 Motion that Texas violated the Double Jeopardy Clause. After the district court denied him his requested relief, he filed a motion for certificate of appealability (C.O.A.) in the United States Court of Appeals. Honorable Justice Edith H. Jones denied his motion because she found his meritorious constitutional claim to be meritless. Appendix A at 2 states: Where, as here, the district court has rejected a constitutional claim on the merits, a C.O.A. should issue only if Townley demonstrates "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further."

Mr. Townley declares that Justice Jones' decision is in error because it is contrary to The United States Supreme Court's precedent held in *Buck v. Davis* and is wholly without jurisdiction under 28 U.S.C. § 2253, lacking a certificate to rule on the merits of a constitutional claim.

In the recent Supreme Court case of *Buck v. Davis*, this Court held that the Fifth Circuit exceeded the limited scope of the C.O.A. Analysis. The C.O.A. statute sets forth a two-step process: an initial determination whether a claim is reasonably debatable, and if so, an appeal in the normal course. 28 U.S.C. § 2253. Mr. Townley believes his case is *Buck 2.0*.

Chief Justice Roberts, writing for the Court, held that the Certificate of Appealability "inquiry, we have emphasized, is not coextensive with a merits analysis." According to the Chief Justice, "the question for the Fifth Circuit was not whether [Townley] had shown extraordinary circumstances. Those are ultimate merits determinations the panel should not have reached. We reiterate what we have said before: a court of appeals should limit its examination at the C.O.A. stage to a threshold inquiry into the underlying merit of [the] claims, and ask only if the District Court's decision was debatable."

At the first stage, the only question is whether the applicant has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims or — could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S.Ct. 1029, 1039 (2003).

Here, the Fifth Circuit phrased its determination in proper terms. But it reached its conclusion only after essentially deciding the circumstances. The question for the Court of Appeals was not whether [Townley] had shown that his case was extraordinary; it was whether jurists of reason could debate that issue. The Fifth Circuit's thorough (Five Month) consideration of the merits to defend that court's approach, hurts rather than helps its determination.

The Fifth Circuit Court of Appeals lacked jurisdiction to rule on the merits of Mr. Townley's claim because it inverted the statutory order of operations by deciding the merits of an appeal and then denying the COA based on adjudication of the actual merits. It placed too heavy of a burden on [Mr. Townley] at the COA stage. Buck 2.0.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Joshua E. Tomley

Date: June 07, 2022