No. _____

In The Supreme Court of the United States

Justin Michael Fenney, Petitioner

v.

Tracy Beltz, Warden Faribault Correctional Facility, Minnesota, Respondent.

On Petition For Writ of Certiorari To The Eighth Circuit Court of Appeals

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In deciding whether to issue a certificate of appealability under 28 U.S.C. § 2253, may a federal court find that "reasonable jurists would not disagree" about the denial of relief where there remains no factual support for maintaining the conviction.

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OPINIONS BELOW

The Eighth Circuit Judgment in *Fenney v. Beltz*, No. 22-1794, denying the request for a certificate of appealability (Appendix A) is unreported. The Order of the United States District Court, *Fenney v. Beltz*, 21-cv-01679 (JRT/HB) (D.Minn. March 11, 2022), appears at Appendix B. The Report and Recommendation of the Magistrate Judge appears at Appendix C. Mr. Fenney's petition for panel rehearing was denied by an Order dated July 13, 2022. This Order appears at Appendix D. Mr. Fenney had an appeal to the Minnesota Court of Appeals, *Fenney v. State*, A19-2053 (Minn.App. Sept. 8, 2020). This opinion appears at Appendix E. Mr. Fenney petitioned the Minnesota Supreme Court for review. This was denied by an Order dated November 17, 2020, which appears at Appendix F.

JURISDICTIONAL STATEMENT

The order sought to be reviewed was entered on July 13, 2022. (Appendix D). Petitioner invokes this Court's jurisdiction on the basis of 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

The questions presented implicate the following provisions of the United States Constitution:

AMEND. XIV, No state shall … deprive any person of life, liberty, or property without due process of law.

AMEND. V, No person shall be … deprived of life, liberty, or property without the due process of law.

AMEND. VI, In all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense.

The questions further implicate the following statutory provisions:

28 U.S.C. § 2253(c), which states:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from— (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2254, which is reproduced verbatim in the appendix to this section. (Appendix G).

STATEMENT OF THE CASE

At Mr. Fenney's trial, there were two witnesses who were alleged to have witnessed the assault. Neither witness was truthful regarding what had taken place.

Lashawna Harris testified she could not remember much of the incident. (T. 52, 66). She was highly intoxicated and had been passed out earlier in the night. (T. 55). She recalled waking up, to find her friend, Dallas Wright, between her legs performing oral sex on her. (T. 55). When Mr. Fenney came into the apartment at about 10:00 p.m., she was engaged in that sexual act with Dallas Wright, a fact she did not admit until just two (2) days before trial. (T. 39, 45, 55, 69, 213).

On April 18, 2013, Ms. Harris went to the St. Paul Police Department and gave a detailed, long and emotional statement about the incident with Petitioner. (See 2013 Postconviction Exhibits 1 and 2 – April 18, 2013 Police Report at 2 Doc. 33). She went to police because she had not told the truth about the incident and was scared that she had committed perjury. (Id.). She repeatedly explained that at the time of the incident, she was scared that if she admitted her part in the incident, and told the truth about it, her daughter would be taken away from her and she could be charged with domestic assault. (Id). She described her role in the assault, including that she "charged him" multiple times and punched him. (Id).

She gave a different version of the key events that occurred before, and in, the bathroom and the onset of pain in her body.

Harris told Fenney to give her the keys and punched him. Fenney pushed Harris against a wall so hard that she fell to the ground. She grabbed Fenney's leg. He kicked her in the stomach, but she didn't let go his leg. Fenney kicked Harris in the head then walked towards the bathroom. He said, "Bitch, my face" as he looked at himself in the mirror and Harris pushed him. Fenny caught himself before falling over. While he was still bent over, he held onto her hair then grabbed the front of her face and threw her onto the bathroom sink / countertop. Harris hit her head and back. Fenney pushed Harris up, pulling her off her feet, so they weren't touching the ground. Harris said pain shot through her back. Fenney then walked away and Harris got up. As she took a few steps, she felt like her body was "caving on itself", as though her body was like spaghetti, and then she fell. (Id. at 3).

On the recorded statement, and in the police report memorializing her statement, Harris repeatedly said she never lost consciousness, she knows no sexual assault happened, and she tried to tell that to the prosecutor and the victim's advocate. (Id. 4, Recorded Statement at 49-52:45).

At an evidentiary hearing on April 17, 2014, Ms. Harris was called to testify. Before her testimony, she was given an instruction on her right against self-incrimination and the hearing related to her testimony was continued to allow her to consult with counsel. (4-17-14 T. 13). However, prior to that, the officer who took the statement was called to testify, and a copy of the recorded statement was

offered. (4-17-14 T. 9-10). At a second evidentiary hearing, on May 20, 2014, Ms. Harris was again called to testify. At that time, she invoked her against incriminating herself and refused to testify. (5-20-14 T. 31).

Following this, Mr. Fenney argued that the April 18, 2013 statement was admissible as a statement against penal interest and that Ms. Harris, who refused to testify, was unavailable. The prosecution argued the statement was not admissible. The district court concluded that the statement would have been admissible as a statement against interest, but denied Mr. Fenney's request for a new trial, concluding that because Mr. Harris still could not say how she suffered the injury to her anus, and because the district court at trial had relied much more heavily on medical testimony than that of Ms. Harris, that Mr. Fenney could not satisfy the second prong of the *Larrison* test even if the court were to believe what Mr. Harris said on April 18, 2013. (See October 16, 2014 Order P. 10-11).

Dallas Wright provided some additional detail about what happened that night in his testimony. He stated that Harris went to put her daughter to bed around 9:00 or 9:15. (T. 38). When Harris came back out, she stripped in front of him. (T. 39). According to Wright, they were then on the couch together. (T. 39). When asked what time they were on the couch, he said, "Like 9:50, 10:00, somewhere around there." (T. 39). Mr. Wright testified that he had engaged in oral sex with Ms. Harris one time prior to this incident, but that he had never had intercourse with her. (T. 45).

In or around May 2018, Mr. Fenney received a letter from Dallas Wright, who was the individual Ms. Harris was engaged in sexual relations with when Mr. Fenney entered the apartment. In that letter, Mr. Wright explained that his testimony did not explain everything that happened on the night at issue and he wanted to clear the air. He explained, for the first time, that he and Ms. Harris had engaged in anal sex that night before Mr. Fenney came home. Mr. Wright also explained that he wanted to tell everything that happened because he felt bad for not saying everything at trial. As a result of this, Mr. Fenney engaged a private investigator to interview Mr. Wright and obtain a statement from him, if he was willing to give one. Mr. Wright was willing to sign an affidavit, in which he affirmed what he told Mr. Fenney in the letter. (See 2019 Postconviction Exhibit 2 - Wright Affidavit). Based on that affidavit, Mr. Fenney filed a petition for postconviction relief in August 2019.

The state district court denied Mr. Fenney's claim without a hearing, concluding that even if what Wright said was true, it would have no impact on the outcome of Mr. Fenney's case. The Minnesota Court of Appeals affirmed. In reaching this conclusion that this evidence which showed that the prosecution used false testimony and which offered an alternative explanation for LH's injuries, would not change the outcome of the case, the state courts made an unreasonable determination of fact, unsupported by the record, in light of the available evidence.

Mr. Fenney then sought habeas relief, asserting that the state courts made an unreasonable determination of fact in light of the evidence presented when they

determined that he was not entitled to relief based upon newly discovered evidence of false testimony provided by prosecution witness Dallas Wright

REASONS FOR GRANTING THIS PETITION

I. The Eighth Circuit applied a heightened standard in denying a COA on Mr. Fenney's claims.

Mr. Fenney was required to secure a certificate of appealability as a prerequisite to his appeal of the District Court's dismissal of his habeas petition. See 28 U.S.C. § 2253(c)(1)(B). Under AEDPA, an application for a COA must demonstrate "a substantial showing of the denial of a constitutional right." Id. at (b)(2). A COA must issue if either: (1) "jurists of reason could disagree with the district court's resolution of his constitutional claims" or (2) "that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Id. Where the petition has been denied for some procedural issue and the district court did not reach the merits in the petition, the COA should issue if the petitioner shows a valid claim of denial of constitutional rights and that jurists of reason would find it debatable whether the district court was correct in its procedural decision. *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). A petitioner need not show "that the appeal will succeed." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). This Court has stated that, "a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338.

After review of Mr. Fenney's claims, the Eighth Circuit concluded that no reasonable jurists would disagree with the district court's denial of Mr. Fenney's

petition despite the fact that there are no witnesses of consequence who continue to stand by their trial testimony.

A. There is no factual support to maintain Mr. Fenney's conviction.

28 U.S.C. § 2254(d)(2) provides a basis for relief where the state courts made an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." (28 U.S.C. § 2254(d)(2). There is presumption that state court findings of fact are correct, but that presumption is not unlimited. As this Court has cautioned:

> Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence.

Miller-El v. Cockrell (2003) 537 U.S. 322, 340. Simply because the AEDPA puts in place a demanding standard for review of state court factual findings is not a basis for dismissal of a claim without review on the merits after evaluation of the evidence presented and the claims made.

Mr. Fenney contends that the state court factual determinations related to the impact the Wright evidence would have on his case are not supported by the record. Whether Ms. Harris suffered her injuries as the result an intentional sexual assault by Mr. Fenney or by other means was always the sole issue in this matter. Ms. Harris claimed not to remember what happened during the fight or with Mr. Wright before Mr. Fenney entered the home. However, Ms. Harris has since claimed to remember more than she testified about, but still not how she was

injured, and she has not made any statement about what she recalls doing with Mr. Wright.

Mr. Wright has stated in an affidavit that he and Ms. Harris engaged in anal intercourse before Mr. Fenney came home. In a case where the allegation is criminal sexual conduct based on injuries the victim suffered to her anus, this is evidence that has the potential to change the outcome of the case if true,

The testifying doctor was only asked about a very specific set of conditions, and there is no testimony about whether consensual anal intercourse had to the potential to cause a perforated colon, which it does. (See 2019 Postconviction Exhibit 3 - Journal of Surgery: Rectal Perforation after Anal Intercourse). The fact that this is a known injury that can occur from anal sexual intercourse, and the fact that Ms. Harris and Mr. Wright had engaged in anal intercourse, while both intoxicated, shortly before Mr. Fenney arrived home provides another factual basis for Harris's injury. In concluding it could not, and thereby ignoring the new Wright evidence, the state courts made an unreasonable determination of fact.

Even if the anal intercourse itself did not cause the injuries at issue, part of what Dr. Bennett testified about was how the injury would require a high degree of force, and was this unlikely to be accidental, because of the sphincter muscle being strong and tight. (T. 248). It stands to reason that engaging in anal intercourse would raise the possibility of such an injury occurring in an accidental manner given that it would involve penetration beyond that muscle.

In a case where the medical testimony was so highly regarded, the fact is that because neither Mr. Wright nor Ms. Harris never disclosed they had engaged in anal intercourse prior to trial, Mr. Fenney was not able to pursue this line of questioning or present the possibility of drunken anal sex as an alternate theory, either directly, or in the role of making accidental injury more likely, when that is a viable explanation for Harris' injuries. (See 2019 Postconviction Exhibit 3 - Journal of Surgery: Rectal Perforation after Anal Intercourse)

Even Harris herself went to police on April 18, 2013 and stated that she knew that Mr. Fenney had not sexually assaulted during their fight. During that recorded statement Harris repeatedly said that she never lost consciousness, that she knows no sexual assault happened, and that she tried to tell that to the prosecutor and the victim's advocate. (4-18-13 Recorded Statement at 49-52:45). While Harris was ultimately pressured into silence when she was instructed on perjury at the ensuing evidentiary hearing, there is significant evidence that Harris, like Wright, also feels that her testimony about what happened was not full and was not truthful.

Under these circumstances where both of the primary factual witnesses have recanted or admitted that their testimony left out important details, the failure to grant relief, or at least allow Mr. Fenney to continue to pursue relief through an appeal, would result in a fundamental miscarriage of justice.

The fundamental miscarriage of justice exception serves to prevent a procedural default from keeping a "federal habeas court from adjudicating for the

first time the federal constitutional claim of a defendant who in the absence of such adjudication will be the victim of a miscarriage of justice." *Wainwright v. Sykes*, 433 U.S. 72, 91 (1977). "[I]n an extraordinary case, where a constitutional violation has probably resulted in the conviction of someone who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Murray v. Carrier*, 477 U.S. 478, 496 (1986). The principles of comity and finality of state court decision "must yield to the imperative of correcting a fundamentally unjust incarceration." *Engle v. Isaac*, 465 U.S. 107, 135 (1982). It would be a miscarriage of justice, sufficient to overcome any procedural default issues, if the petitioner can make a showing of actual innocence, either of the crime or of the punishment. *See Schlup v. Delo*, 513 U.S. 298 (1995); *Sawyer v. Whitely*, 505 U.S. 333 (1992).

A showing of innocence of the crime able to overcome a procedural default is made by showing of constitutional error supported by new reliable evidence that was not presented at trial and must establish that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence. *House v. Bell*, 547 U.S. 518, 536-38 (2006) (holding that actual innocence gateway claims are governed by the more likely than not standard rather than the clear and convincing standard the AEDPA applies to second or successive petitions); *Schlup*, 513 U.S. at 324; *Weeks v. Bowersox*, 119 F.3d 1342 (8th. Cir. 1997). A showing of actual innocence requires review of procedurally barred, abusive, or successive claims. *House*, 547 U.S. at 537.

Where neither the primary witness nor the only other person present during any portion of the alleged assault stand by their trial testimony, or have come forward to state they did not tell the whole story during their testimony, there is reason to doubt whether Mr. Fenney is guilty of the offenses he was convicted of. Given that a COA should issue if jurists of reason could disagree with the lower court's conclusions, or even if the petitioner has presented issues that deserve encouragement to proceed further, a COA should have issued in this case where the primary witnesses no longer stand by their trial testimony. In concluding that a COA should not issue on these facts, the Eighth Circuit applied a heightened standard above that which is prescribed by statute.

CONCLUSION

For the reasons stated above, Mr. Fenney respectfully requests that this Court grant this petition for certiorari.

Respectfully submitted.

Dated: October 11, 2022

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