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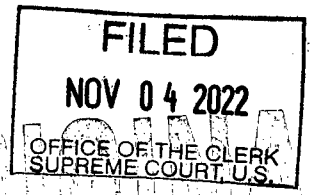

IN THE

SUPREME COURT OF THE UNITED STATES

BRENT STEPHENS -- PETITIONER

vs.

BOBBY LUMPKIN -- RESPONDENT

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 THE MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

BRENT STEPHENS

TDCJ-ID # 1981218

RAMSEY UNIT

ROSHARON, TX 77583

(281) 595-3491

QUESTION(S) PRESENTED

QUESTION A: Whether the Trial Court had the authority to supplant the verdict of the jury on punishment?

QUESTION B: Whether the U.S. District Court Magistrate properly imposed a bar pursuant to: **28 U.S.C. § 2244, and 2254?**

QUESTION C: Whether the Federal Court of Appeals for the Fifth Circuit adequately determined that a Certificate of Appealabilty should not issue?

LIST OF PARTIES

[X] 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 subject of this petition is as follows:

The Director of TDCJ-ID is represented by:
The Attorney General of the State of Texas
Ken Paxton
P.O. Box 12548
Austin, TX 78711-2548

RELATED CASES

State of Texas v. Brent Stephens,
In the 158th Judicial District Court of Denton County, Texas
Cause nos. F-2013-0121-B and F-2014-0742-B
Judgements entered - January 16, 2015 (See Appendix - U)

Stephens v. State 2016 Tex.App. LEXIS 4790
(Tex.App. - Fort Worth 2016)(Unpublished) (See, Appendix - R)

Stephens v. State, 2016 Tex.Crim.App. LEXIS 969
(Tex.Crim.App. 2016)(Unpublished) (See, Appendix - S)

Stephens v. State, 2016 Tex.Crim.App. LEXIS 974
(Tex.Crim.App. 2016)(Unpublished) (See, Appendix - S)

Ex Parte Stephens, WR-87,651-01 (Unpublished) (See, Appendix - T)

Ex parte Stephens, WR-87,651-02 (Unpublished) (See, Appendix - T)

Stephens v. Director of TDCJ-CID, Nos. 4:18cv103, 4:18cv104,
U.S.D.C. Eastern District of Texas, Sherman Division:
Magistrate Report and Recommendation (See, Appendix - C)

Final Decision (See, Appendix - B)

Stephens v. Lumpkin, Cause No. 21-40370
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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a certiorari issue to review the judgment below.

OPINIONS BELOW

The Opinion of the United States Court of Appeals appears at Appendix - A to the Petition and is Unpublished.

The Opinion of the United States District Court appears at Appendix - B to the petition and is unpublished.

The date on which the United States Court of Appeals decided my case was March 31, 2022.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: August 16, 2022 , and a copy of the order denying rehearing appears at Appendix - D.

JURISDICTION

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Provision	Appendix
U.S. Const. Amend. V	E
U.S. Const. Amend. VI	F
U.S. Const. Amend. XIV	G
28 U.S.C. § 2244	H
28 U.S.C. § 2253	I
28 U.S.C. § 2254	J
Texas Penal Code § 3.01	K
Texas Penal Code § 3.03	L

Texas Penal Code § 21.11.....M
Texas Code of Criminal Procedure art. 37.07.....N
Texas Code of Criminal Procedure art. 37.072.....O
Texas Code of Criminal Procedure art. 38.37.....P
Texas Code of Criminal Procedure art. 42.08.....Q

STATEMENT OF THE CASE

This case arises out of a conviction from the 158th Judicial District Court of Denton County, Texas. The Petitioner was charged with four counts of Indecency with a Child in two separate indictments. (See, App. - U) The Petitioner plead not guilty and elected to have a "Jury," trial. **Id.** The Petitioner was tried by a jury found guilty, and sentenced by the jury in these cases. The Petitioner received One (1) Ten year sentence, two (2) five years sentences, and One (1) three year sentence.

After sentencing and the jury was dismissed, the trial judge supplanted the determination of sentence by the jury and held the sentences would be served consecutively.

The Petitioner appealed the convictions and sentencing issues, however, Appellate Counsel provided ineffective assistance of counsel in presenting a known frivolous claim to the Court of Appeals, Fort Worth, Texas. (See, App. - R) The Petitioner subsequently sought a Petition for Discretionary Review in the Texas Court of Criminal Appeals at Austin, Texas; which were refused. (See, App. - S) Finally, in the State Court the Petitioner sought an Application for a Writ of Habeas Corpus in the Texas Court of Criminal Appeals, which were denied without a written order upon the finding of fact and conclusion of law in

the trial court. (See, App. - T)

After exhausting State court collateral procedures, the Petitioner sought Federal habeas corpus review in the United States District Court, Eastern District of Texas, Sherman Division. (See, App. - B & C) The District Court denied the Petitioner's petition pursuant to 28 U.S.C. § 2254, based upon the Magistrate Report and Recommendation, without any form of analysis based upon the objections to said Report and Recommendation. (See, App. - B) The United States Magistrate improperly applied a procedural denial based upon the erroneous findings of the State trial court that the issue concerning the "stacking," of the sentences wasn't preserved on direct appeal, or on the subsequent Petition for Discretionary Review. (See, App. - C, pp. 9-17) The Magistrate merely followed the State habeas corpus decision, applied an improper presumption of correctness, and failed to investigate the direct appeal decision. (See, App. - R, p. 10 -- Double sided document: **"Stacking of Sentences"**) Therefore, the Magistrate Report and Recommendation improperly procedurally barred the claim based solely upon the erroneous finding of fact and conclusion of law which was signed pro for'ma by the 158th Judicial District of Texas presiding judge, minus any benefit of an actual review.

The United States Court of Appeals for the Fifth Circuit, denied the Petition for Certificate pursuant to 28 U.S.C. § 2253, and the subsequent motion for rehearing thereafter, with an opinion utilizing boiler plate language without any proper determination of the issues at hand. (See, App. - A)

REASONS FOR GRANTING THE PETITION

The State of Texas, the United states District Court, and the United States Court of Appeals has entered a decision in conflict with the decisions of another United States Court of Appeals on the same important question, and has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

BRIEF IN SUPPORT

QUESTION A: Whether the Trial Court had the authority to supplant the verdict of the jury on punishment?

In Texas the trial court has the authority, when a defendant is convicted of two or more cases, whether or not to run the sentences concurrently or cumulatively. (See, **Tex.C.C.P. art. 42.08**; App. - Q) However, when a defendant elects, prior to trial, to have the jury determine both guilt/innocence and punishment, the decision is up to the jury to decide. (See, **Tex.C.C.P. art. 37.07 Sec. 2(b)**; App. - N) The Texas Code of Criminal Procedure, specifically states that a defendant shall be sentenced "(2) in other cases where the defendant so elects in writing before the commencement of the voir dire examination of the jury panel, the punishment shall be assessed by the same jury, . . . (3) Punishment shall be assessed on each count on which a finding of guilt has been returned." **Id.**

As stated the Trial Court, after the determination of guilt and appropriate punishment by the jury, decided to run the sentences cumulatively minus benefit of any such decision of the jury.

Said decision of the trial court judge violated the Petitioner's Fifth, Sixth, and Fourteenth Amendment Rights of Due Process, and the right to be tried and sentenced by a jury of his peers.

The Petitioner asserts that Appellate Counsel failed to provide adequate representation when counsel presented a claim the Court of Appeals which the court was forced to accept as having no prospects for success. (App. - R, p. 10) It is well determined that: "The appellate lawyer must master the trial record, thoroughly research the law, and exercise judgement in identifying the arguments that may be advanced on appeal. In preparing and evaluating the case, and in advising the client as to the prospects for success, counsel must consistently serve the client's interest to the best of his or her ability." **McCoy v. Court of Appeals**, 486 U.S. 429, 438, 109 S.Ct. 1895 (1988)

The Court of Appeals in this case acknowledged the concession by appellate counsel, and claimed the argument was for the purpose of preserving it "so that he can raise the issue in the court of criminal appeals." **Stephens v. State**, 2016 Tex.App. LEXIS 4790 (Tex.App. - Fort Worth 2016)(unpublished) It is well established that the Texas Court of Criminal Appeals is a Discretionary Court, and it is not a matter of right, but review is of the Court's discretion. **Gregory v. State**, 176 S.W.3d 826, 828 (Tex.Crim.App. 2005) Therefore, the Petitioner's Appellate Counsel pursued a ground counsel knew full well would be denied upon procedural grounds, and possibly not reviewed by a Discretionary Court. Therefore, the Petitioner was forced to seek habeas corpus review under **Tex.C.C.P. art. 11.07.**

In Texas when the defendant so elects is entitled to a trial by the jury. See, **Tex.C.C.P. art. 37.07.** This trial by jury includes the guilt/innocence and punishment phases. **Id.** If a jury sentences the defendant the issue of the proper amount must be brought before the jury. **Id.** In the instant case, the provisions of **Tex.C.C.P. art. 37.072** are inapplicable. (See, Appendix - P) The State was allowed to present, before the jury, extraneous offenses pursuant to **Tex.C.C.P. art. 38.37.** Therefore, all the evidence before the court was also presented for consideration to the jury.

Texas Penal Code § 3.01, provides the definition of a "Criminal Episode," in the instant case. (See, Appendix - L) The Court improperly acted under the color of law pursuant to: **Tex. Penal Code § 3.03.** (See, Appendix - L) The jury had already handed down the sentences, which were run concurrently with each other. As stated earlier, the judge of the Court then improperly determined that the sentence wasn't adequate, and imposed a sentence beyond the statutory maximum through the cumulative order. (See, Appendix - U)

It is well determined that the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proven beyond a reasonable doubt. See, **Apprendi v. New Jersey**, 530 U.S. 466 (2000); See also, **State v. Demeritt**, 2004 U.S.Dist. LEXIS 25815, 2004 DNH 186; see also, **Garza v. State**, 2006 Tex.App. LEXIS 5345. In the instant case, the Double Jeopardy Clause was violated due to the double punishment beyond the stautory maximum allowed by Legislatures.

The Double Jeopardy Clause protects against the risk of multiple punishment for the same offense, as well as against the risk of successive prosecutions. **Brown v. Ohio**, 432 U.S. 161, 165-166 (1977) The Texas Constitution prohibition against multiple punishments for the same offense is no broader than the guarantee under the double jeopardy clause of the federal constitution. **State v. Marshall**, 814 S.W.2d 789, 792 (Tex.App. - Dallas 1991, pet ref'd) The purpose of the multiple punishment prohibition is to ensure that a court does not exceed, by the devise of multiple punishments, the sentencing limits by the legislative branch. **Jones v. Thomas**, 491 U.S. 376, 381 (1989)

If the cumulative punishments imposed on a defendant are for offenses considered to be the same for the purpose of double jeopardy, punishment must be limited to the maximum prescribed for the greater offense for which the defendant was validly convicted. **Jeffers v. United States**, 432 U.S. 137, 145-158 (1977)

The "stacking" order of the trial court in this case was in addition to the sentence imposed by the jury. Therefore, the double jeopardy bar to multiple prosecutions and punishment is to be applied. Such violation **can** be raised for the first time on direct appeal, contrary to the assertions of the State and Magistrate in the instant case. **Ex part Rathmell**, 717 S.W.2d 33, 35 (Tex.Crim.App. 1986), and **Lockridge v. State**, 949 S.W.2d 339, 341 (Tex.App. - Tyler 1996, pet ref'd) In Texas sentences after a conviction are normally run concurrently, not consecutively. **Ex parte McJunkins**, 954 S.W.2d 39 (Tex.Crim.App. 1997)

Therefore, the State of Texas, the United States District Court, and the United States Court of Appeals has entered a decision in conflict with the decisions of another United States Court of Appeals on the same important question, and has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

QUESTION B: Whether the U.S. District Court Magistrate properly imposed a bar pursuant to: **28 U.S.C. § 2244, and 2254?**

The Magistrate applied an improper presumption of correctness to the State court fact finding. (See, Appendix - C, pp. 9-16) The Magistrate stated that the State Court fact finding determined that: "Petitioner argues the trial court erred in improperly charging the jury regarding the stacking of his sentences. In Claim Four (e), Petitioner argues the trial court lacked jurisdiction to cumulare his sentence. Neither claim was raised on direct appeal or in Petitioner's PDRs. **Stephens**, 2016 WL 2586639; Stephens, Nos. PD-0740-16, PD-0741-16 (Dkt. # 16-19)." (See, Appendix - C, p. 10) However, when the direct appeal opinion is reviewed, the issue of the improper stacking order was indeed raised on direct appeal. (See, Appendix - R, p. 10) The Texas Court of Criminal Appeals as a discretionary Court did not issue any opinion of the PDRs of the Petitioner, therefore the Look Through Doctrine is to be applied to the Court of the Last Reasoned Opinion, which was the Court of Appeals. (See, **Ylst v. Nunnermaker** 501 U.S. 797, 803-804 (1991))

The Magistrate failed to adequately analyze the Claim before the Court, and made its recommendation based solely upon the state fact finding on habeas corpus. (See, Appendix - C, pp. 9-17) As the issue was raised on Direct Appeal, on PDR, and finally on habeas corpus in the State Court, the issue was to be deemed exhausted pursuant to federal habeas statutes, and in no way procedurally barred.

The Petitioner timely objected to the Magistrate Report and recommendation, however, the U.S. District Judge did not adequately address these objections. Instead, the District Judge merely adopted the Report and recommendation without any formed opinion or address of the issues within the objections of the Petitioner. (Appendix - B)

The AEDPA provides that a federal court may only grant habeas relief if the state court decision denying relief 'was contrary to or involved an unreasonable application of clearly established federal law.' See, **Catlan v. Cockrell**, 315 F.3d 491, 493 (5th Cir. 2002) However, the U.S. District Court must fully consider and dispose of each distinct and separate point raised by the Petitioner. See, **Johnson v. McCotter**, 635 F.Supp. 685, 686-87 (E.D. Tex. 1986); citing, **Flowers v. Blackburn**, 759 F.2d 1194 [1195] (5th Cir. 1985), and **Flowers v. Blackburn**, 759 F.2d 1195 [1196] (5th Cir. 1985) In the instant case, the District Judge failed to properly consider and dispose of each claim. Furthermore, the District Judge failed to conduct a de novo review of the record.

A District Court "must resolve all claims for relief raised in petition for writ of habeas corpus, regardless of whether relief is granted or denied." **Clisby v. Jones**, 960 F.2d 925, 936 (11th Cir. 1992); See also, **Nichols v. Collins**, 802 F.Supp. 66, 78-79 (S.D.Tex. 1992)--(State Court's signing of 35 pages of findings of fact and conclusions of law which were verbatim adoption of state's proposed findings and reflected no independent input from state judge, . . . resulted in cummulative error.)

Finally, it is "incumbent on district court to independently examine relevant pleading and state court record to determine whether the interest of comity and federalism will be better served by addressing the merits forth with or by requiring a series of additional state court proceedings before reviewing merits of petitioner's claims." **Flores v. Johnson**, 957 F.Supp. 893, 905 (W.D.Tex. 1997)

Therefore, the State of Texas, the United States District Court, and the United States Court of Appeals has entered a decision in conflict with the decisions of another United States Court of Appeals on the same important question, and has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

QUESTION C: Whether the Federal Court of Appeals for the Fifth Circuit adequately determined that a Certificate of Appealabilty should not issue?

The United States Court of Appeals for the Fifth Circuit, entered a pro for'ma response to the Petitioner's Petition for Certificate Of Appeal ("COA"). (See, Appendix - A, -??)

In habeas corpus proceedings before district judges, the final order is subject to review, on appeal, by the United States Court of Appeals. **28 U.S.C. § 2253** An Appellant must obtain a Certificate of Appealability. **Id.** A Certificate of Appealability should issue if applicant has made "a substantial showing of the denial of a constitutional right" by demonstrating "that reasonable jurist would find the court's assessment of the constitutional claims debatable or **wrong**." **28 U.S.C. § 2253(c)(2)_(Emphasis added);** **Tennard v. Dretke**, 542 U.S. 274 (2004) The Fifth Circuit may not make a determination of the merits in the application process. **Buck v. Davis**, 137 S.Ct. 759 (2017)

To qualify for a COA, the appeal must raise at least one issue as to which the petitioner makes a substantial showing of a denial of a federal right. **Barefoot v. Estelle**, 463 U.S. 880 (1983) As demonstrated above, the Petitioner raised a valid claim concerning the stacking order of the trial court after the jury returned the verdict on punishment. Thereby, increasing the statutory maximum for the crime alleged within the indictment, without any jury finding on the matter.

Further, a COA should issue when the issue is not squarely foreclosed by statute, rule, or authoritive court decision, or lacking factual basis in the record. **Autry v. Estelle**, 464 U.S. 1301, 1302 (1983)

There does not appear to be any precedence on this issue concerning the constitutionality in the State Texas when a judge goes behind the jury and stacks a sentence without submitting such an instruction to the jury.

In fact the statutes, when compared, seem in opposition when compared. (cf. Appendix - L, **Texas Penal Code § 3.03**, and Appendix - N, **Texas Code of Criminal Procedure art. 37.07 Sec. 3(b)** "After the introduction of such evidence has been concluded, and if the jury has the responsibility of assessing the punishment, the court shall give additional written instructions as may be necessary and the order of procedures and the rules governing the conduct of trial shall be the same as are applicable on the issue of guilt or innocence.") As such, the Trial Court would not be allowed to alter a not guilty or guilty verdict, so should the Court not be allowed to alter a sentence post jury finding.

As demonstrated above, the United States Magistrate Judge made the Report and recommendation based upon purely procedural ground on the issue of the stacking order. **supra** Therefore, when a federal district court denies a habeas petition on procedural grounds without reaching the underlying constitutional claim, a COA should issue, if the applicant shows that jurist of reason would find it debatable whether the federal court that denied habeas relief was correct in its procedural ruling. **Slack v. McDaniel**, 529 U.S. 473 (2000)

Therefore, in one case, the United States Supreme Court held that the Court of Appeals had erroneously refused to grant a COA on the ground that the petitioner's habeas corpus was denied on a procedural ground. Because it was debatable whether the procedural dismissal was correct, the petitioner was entitled to a COA to challenge the procedural ruling. **Id.**

It is not proper to hold a petitioner has failed to make a "substantial showing," for a COA simply because the district court has denied the petition on the merits. **Id.** **Barefoot**, 463 U.S. at 893 n. 4 (1983) The question is the debatability of the constitutional claim, not the resolution of the debate. **Miller-El v. Cockrell**, 537 U.S. 322, 333-335 (2003)

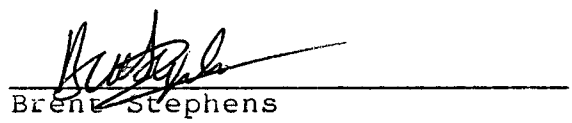
In the instant case, the Court of Appeals has determined that the Petitioner has not made substantial showing, however, this was only referencing debatability, and not the fact that the procedural ground was wrong. Therefore, the Court of Appeals has determined the merits of the issues, and failed to adequately determine the fact that the District Court was wrong. (See, Appendix - A)

Therefore, the State of Texas, the United States District Court, and the United States Court of Appeals has entered a decision in conflict with the decisions of another United States Court of Appeals on the same important question, and has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted



Brent Stephens

On this the 4th day of November, 2022.