22-6474

ORIGINAL

In the
United States Supreme Court

CODY JAY RILEY - PETITIONER

-vs-

BOBBY LUMPKIN - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Cody Jay Riley
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Pro Se

QUESTIONS PRESENTED

1. Does a state violate the Americans with Disabilities Act when incarcerating a person living with HIV outside of any penological interests?

2. When new science emerges and nullifies a critical element of an offense, violating the Constitutional Due Rights of a person, does the miscarriage of justice warrant an exception to the one-year filing limitations under the AEDPA?

3. When new science proves actual innocence of the charge convicted, even if it does not neccessarily include lesser included offenses, does the Due Process violation from the illegal sentence warrant an exception to the one-year filing limitations under the AEDPA?

4. When does scientific hypothesis become scientific fact for the purposes of establishing factual predicate under the AEDPA (28 USC §2244(d)(1))?

List of Parties

All parties appear in the caption of the case of the cover page of this brief.

Related Cases

State of Texas v. Riley, No. F45054, 413th Judicial District Court, Johnson County, Texas. Judgment entered on October 26, 2011 following trial and sentencing by jury.

Riley v. State of Texas, No. 10-11-00439-CR, 2014 WL 1016240, Texas Court of Appeals for the Tenth District at Waco, Texas. Judgment entered on March 13, 2014.

Riley v State of Texas, No. PD-0427-14, Texas Court of Criminal Appeals, Petition for Discretionary Review denied without written order on August 20, 2014.

Ex parte Riley, No. WR-88, 409-01, Texas Court of Criminal Appeals, Writ of Habeas Corpus denied without written order on June 6, 2018.

Riley v Bobby Lumpkin, No. 3:18-cv-2439-S-BN, US District Court for the Northern District of Texas, Petition for writ of habeas corpus dismissed as time-barred on September 24, 2021.

Riley v Lumpkin, No. 21-11062, US Court of Appeals for the Fifth Circuit, Certificate of Appealability denied on August 8, 2022. Petition for Rehearing denied on September 15, 2022.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner, Cody Jay Riley, respectfully prays that a writ of certiorari issue to review the judgment below:

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit appears at Appendix O to this petition and is unpublished.

JURISDICTION

The date on which the United States Courtof Appeals for the Fifth Circuit decided my case was on August 8, 2022. Subsequently, a Petition for Rehearing was accepted and denied on September 15, 2022. A copy of the order denying rehearing appears at Appendix P to this petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

US Constitution, Amendment 5

> No person shall [] be deprived of life, liberty, or property without due process of law.

US Constitution, Amendment 8

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

US Constitution, Amendment 14

> [] 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 to deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §2244(d)(1)

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of —

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the excersize of due diligence.

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.

42 U.S.C. §§12101-12213 (Americans with Disabilities Act)

[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. (§12132)

Texas Penal Code §1.07(a)(17)(B)

In this code: "Deadly Weapon" means: anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.

Texas Penal Code §22.021(a)(1)(B)

A person commits an offense: if the person: regardless of whether the person knows the age of the child at the time of the offense, intentionally or knowingly:

(i)causes the penetration of the anus or sexual organ of a child by any means; [or]

(iii) causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor, and (2)(A)(iv) if: the person: uses or exhibits a deadly weapon in the course of the same criminal episdde.

STATEMENT OF THE CASE

Petitioner, Cody Jay Riley, a Texas prisoner was convicted in Johnson County, Texas for two counts of Aggravated Sexual Assault of a Child (With the use of a Deadly Weapon) and then sentenced to 70 years confinement on each, served concurrently.

Petitioner submitted a state habeas claiming that his "bodily fluids" did not meet the requirements of the deadly weapon component of his charge because his HIV was undetectable. At the time, the relevant science hinted toward a diminished risk of HIV transmission when the person with HIV was undetectable. The Texas Court of Criminal Appeals denied his habeas without review.

Petitioner then submitted his federal habeas, again arguing that his bodily fluids didnt meet the dealy weapon requirement and that because new science exsisted showing that undetectability meant almost zero risk of transmission he should be allowed through the AEDPA's time bar restrictions. Again, this argument was rejected by the state's attorney's stating that any risk was sufficient. While his federal habeas was still pending, the US Government finally decalred that there was NO risk of HIV transmission and based this statement on the collective of previous studies and peer review, etc that had been accumulating for over a decade. Without considering this new statement, the US District Court dismissed the Petitioner's habeas as time-barred and denied COA.

The Fifth Circuit also denied COA without review. This is now the Petitioner's first petition for writ of certiorari.

STATEMENT OF FACTS

Recent science has now firmly proven that persons living with HIV (PLHIV) who have an undetectable HIV-1 viral load, measured at less than 200 copies/mL, are untransmittable. This new science known as U=U or Undetectable=Untransmittable is the center point of the Petitioner's claims. In light of this new science, the Petitioner's bodily fluids were not capable of being a deadly weapon.

I. The Science

In 2011, the HIV Prevention Trials Network (HPTN) study completed and compared the effects of early and delayed initiation of Antiretroviral Therapy (ART) in the partner with HIV among 1,763 serodiscordant couples (98% of whom were heterosexual). See M.S. Cohen, et al., "Antiretroviral Therapy for the Prevention of HIV-1 Transmission", N.Engl.J.Med., Volume 365, No. 6 (Sept. 1, 2011).(Appendix A).

The finding of a 96.4% reduction in HIV transmission in the early-ART group, versus those in the delayed group, provided the first evidence of treatment as prevention in a randomized clinical trial. At that point, the study could not affirmatively address the durability of the finding or provide a precise correllation of the lack of transmissibility with an undetectable viral load.

Subsequent studies further confirmed and extended these suspicions. The PARTNER-1 study determined the risk of HIV transmission via condomless sexual intercourse in 1,166 serodiscordant couples in which the partner with HIV was receiving ART and had achieved and maintained viral suppression, or undetectability. See Rodger, et al., "Sexual Activity Without Condoms and Risk of HIV Transmission in Serodifferent Couples When the HIV-Positive Parter is using Suppressive Antiretroviral Therapy", JAMA, Volume 316, No. 2, (July 12, 2016).(Appendix B).

After approximately 58,000 condomless sex acts, there were no linked HIV transmissions. Since a minority of the participants in PARTNER-1 were Men who have sex with Men (MSM), there was insufficient statistical power to determine the effect of an undetectable viral load on the transmission risk for receptive anal sex.

In this regard, the Opposites Attract study evaluated transmissions involving 343 serodiscordant MSM couples. After 16,800 acts of condomless anal intercourse there were no linked HIV transmission during 588.4 couple-years of follow-up during which time the partner with HIV had an undetectable viral load. See Bavington, Benjamin, et al., "Results of the Opposites Attract Final Analysis", www.OppositesAttract.net.au, (July 25, 2017). (Appendix C).

Building on these studies, the PARTNER-2 study then conclusively demonstrated that there were no cases of HIV transmission between serodiscordant MSM couples despite approximately 77,000 condomless sex acts when the HIV-positive partner had achieved viral suppression. See Rodger, et al., "*Risk of HIV Transmission through Condomless Sex in MSM Couples with Suppressive ART: The PARTNER2 Study Extended Results in Gay Men", Presented at: 22nd International AIDS Conference; July 25, 2018; Amsterdam, The Netherlands.(Appendix D).

On January 10, 2019, Dr Anthony S. Fauci, Director of the National Institute of Alleggies and Infectious Disease summarized this new science.

> "In summary, even though the clinical data underpinning the concept of U=U[Undetectable=Untransmittable] have been accumulating for well over a decade; it is only recently that an overwhelming body of evidence has emerged to provide the firm basis to now accept this concept as scientifically sound." See Fauci, et al., "HIV Viral Load and Transmissibility of HIV Infection: Undetectable equals Untransmittable", JAMA, Volume 321, No. 5 (January 10, 2019) (Appendix E).

II. Texas State Law in Relation

Texas law provides that a person commits aggravated sexual assault if the person, regardless if they're aware of the age of the child at the time of the offense, intentionally or knowingly performs some form of sexual act with the child and uses or exhibits a deadly weapon in the course of the same episode. Texas Penal Code §22.021.

Texas law also defines a "deadly weapon" as anything that in the manner of its use or intended use is **capable** of causing death or serious bodily injury. Texas Penal Code §1.07(a)(17)(B)(Emphasis added). Lower appellate courts in Texas have further required that

a deadly weapon have more than a "hypothetical chance" of serious bodily injury or death (Johnson v State, 115 SW3d 761, 764 (Tex.App.-Austin 2003)) and also that someone had to be "actually endangered" by the deadly weapon (Drichas v State, 152 SW3d 630, 636 (Tex.App.-Texarkana 2004).

III. The Instant Case

The Petitioner was diagnosed as positive for HIV prior to the offenses of this case and on an ART regimen (medication known as ATRIPLA-established at trial) to obtain an undetectable viral load.

At the time of the petitioner's trial, the general understanding of HIV transmissibility was that it was transmissible through varying degrees depending upon the type of sex act performed.

Petitioner, at the time of the trial, was taking routine blood work to monitor his ART success and to measure his HIV viral load. These labs reflect that three months before the offense, three days before the offense, and three months after the offense, the Petitioner had an HIV-1 viral load of less than 48 copies/mL. (Appendix L).

Based on new studies comparing ART, viral loads, and transmissibility and in conjunction with petitioner's laboratory reports from the relevant time periods, the petitioner was not "capable" of causing serious bodily injury or death and no person was "actually endangered". Because the petitioner's bodily fluids now fail to meet the required definition of deadly weapons (a required element of the offense convicted) the petitioner's conviction can not stand.

1. Does a state violate the Americans with Disabilities Act when incarcerating a person living with HIV outside of any penological interests?

The US Government has acknowledged that due to 40 years of research and significant biomedical advancements to treat and prevent HIV transmission, many state laws are now outdated and do not reflect our current understanding of HIV. See "HIV and STD Criminalization Laws", Center for Disease Control and Prevention, 2022 (Appendix M); and also "Remarks by President Biden to Commemorate World AIDS Day, Launch the National HIV/AIDS Strategy, and Kickoff the Global Fund Replenishment Process", President Biden, December 1, 2021 (Appendix N).

According to the Center for HIV Law and Policy (hivlawandpolicy.org), there are currently 36 states who prosecute HIV cases (under disclosure specific laws or general assault laws) of which only 10 require any form of intent to transmit. This applies even in cases like the one before you today in which no transmission is possible.

The state of Texas repealed their HIV disclosure law in an omnibus package in 1994 but continues to prosecute HIV offenses under general assault laws, such as they did with the petitioner, by claiming that HIV-infected bodily fluids are a deadly weapon. It doesn't even matter what fluid (as in the instant case), just the fact that the petitioner was HIV-positive was sufficient.

Now, based on new science that shows that there was no actual endangerment (Drichas, Id.) and that Petitioner's bodily fluids—none of them——were capable of causing serious bodily injury, as is required under the charge convicted, the state refuses to correct the error. Leaving the deadly weapon finding (which amounts to at least 50 years of the Petitioner's sentence) in place serves no penological interest.

Without a penological interest, Petitioner claims that Texas is discriminating against him by limiting him in his actions based soley on his disability. This discrimination violates the Petitioner's Constitutional rights under the equal protection clause of the Fourteenth Amendment and the ADA. See McClesky v

Kemp, 481 US 279, 292 (1987)(noting that a successful equal protection claim must prove that there was purposeful discrimination.); See also ADA, 42 USC §12132 ("[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.")

a. Does HIV qualify as a disability?

This Court and other lower courts have established that persons living with HIV, even if asymptomatic, are disabled under the ADA and the physical impairment begins from the moment of infection. Bragdon v Abbott, 524 US 624, 637-642 (1998); See also Harris v Thigpen, 941 F2d 1495, 1524 (11th Cir. 1991), Dean v Knowles, 912 F.Supp. 519, 522 (S.D. Fla. 1996).

b. Is there purposeful discrimination?

The HIV pandemic began in the 1980's and caused fear and panic to rip through our country. It was called the "gay disease" and as a result of stigma, discrimination persists even today, after 40+ years.

More recently, another pandemic caused fear and panic to rip through our country and even the world. However, unlike HIV, there are no certain methods available to stop COVID-19 from spreading, it wasn't considered a "gay disease" and no stigma attatches to those who have or have had COVID infection. Rather than meeting COVID infected persons with discrimination they are (rightfully) met with compassion and understanding.

Jane has COVID. She's asymptomatic and took her vaccine and her booster shots. She didn't intend to, but she passed the virus to her naighbor who later died as a result.

John has HIV. He is asymptomatic and on antiretroviral therapy. He had sex with his neighbor. The neighbor did not get HIV and because John was undetectable, could not.

Under Texas assault laws and the current methods of interpretation, both Jane and John could be charged with the use or exhibition of a deadly weapon. Jane's respitory fluids were capable of causing serious bodily injury or death. Her intent and her vaccination status are irrelevant and do not count as

a defense. John's bodily fluids weren't capable of transmission but Texas prosecutes anyways.

To see if there is discrimination, one only needs to see the numerous cases prosecuted in Texas for HIV-related offenses even when there were no risks or possibilities of transmission and then compare this to the number of COVID-related prosecutions. What about Syphyllis, Herpes, or other STDs? The balance of prosecutions aren't even close.

Petitioner would not argue these claims if there were intent to transmit or if transmission actually occurred, but prosecuting persons living with HIV without either of these and soley based on their HIV status is discrimination.

Because Texas is aware of U=U (through the Petitioner's federal habeas proceedings) and that the Petitioner's "bodily fluids" were not "capable" of causing serious bodily injury or death, and because Texas has the means to remove the HIV criminalization from the Petitioner's offense, this clearly equates to "purposeful discrimination." McClesky, Id.

Texas singled out PLHIV for disparate treatment and selected their course of action at least in part for the purpose of causing the adverse effect on PLHIV. Lavernia v Lynaugh, 845 F2d 493, 496 (5th Cir. 1988).

2. When new science emerges and nullifies a critical element of an offense, violating the Constitutional Due Rights of a person, does the miscarriage of justice warrant an exception to the one-year filing limitations under the AEDPA?

Petitioner was convicted by a state court for Aggravated Sexual Assault of a child (two counts). In relation to the case-at-hand, Texas Penal Code §22.021 requires three critical elements. First, it requires some form of sexual contact, secondly, it requires it to be with a child, and third, a deadly weapon must be used or exhibited. Texas law defines deadly weapons as "anything that in the manner of its use or intended use is **capable** of causing death or serious bodily injury." (Emphasis added)(TX.P.Code §1.07(a)(17)(B).

The deadly weapon in the instant case was the Petitioner's "bodily fluids" (no specific fluid plead) as he is positive for the HIV virus.

Petitioner was convicted in October 2011 at a time when Antiretroviral Therapy (ART) was available but there were no scientific understandings in regard to undetectability. The belief at trial was that HIV was always sexually contagious (to certain percentages). The state reasoned at trial that in their use or intended use, the petitioner's bodily fluids were capable of causing (eventual) death or serious bodily injury. Probability and absence of actual transmission to the victim was deemed irrelevant.

Based on new science (Undetectable = Untransmittable or U=U) we no know that because the petitioner's HIV-1 viral load was undetectable, his bodily fluids were not capable of causing death or serious bodily injury as the petitioner's HIV was not capable of being transmitted.

This Court has long held that the Due Process clause of the Fourteenth Amendment forbids a state from convicting a person of a crime without proving the elements of that crime beyond a reasonable doubt. Fiore v White, 531 US 225 (2001); See also Jackson v Virginia 433 US 307, 316 (1979), In re Winship 397 US 358, 364 (1970).

In Schlup, the Court adopted a specific rule to implement this general principle: prisoners asserting innocence as a gateway to defaulted claims must establish in light of new evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." Schlup v Delo, 513 US 298, 327 (1995).

Petitioner's claim is similar to that found in Herrera v Collins (506 US 390, 398 (1993)) which questioned: "if the Constitution prohibits the imprisonment of one who is innocent of the crime in which he was convicted." Unlike Herrera, however, Petitioner offered new scientific evidence that, had it been available during trial, would have rendered jurors unable to find the petitioner guilty of the crime in which he was convicted.

Had the science surrounding U=U been presented to the jury, no juror could have reasonably found that the petitioner's

bodily fluids were capable of serious bodily injury or death. Because this finding is a required element of the charge convicted, petitioner is actuallyuinnocent of aggravated sexual assault.

The US District Court should have allowed the Petitioner's claims to be reviewed on the merits under an actual innocence gateway exception (or for the reasons in question 4), and the Fifth Circuit erred in not reaching this decision by arbitrarily denying petitioner's COA without review. Instead the district court dismissed the petitioner's claims without the oppurtunity to develop it's reasoning or legal basis through full briefing and an evidentiary hearing.

3. When new science proves actual innocence of the charge convicted, even if it does not neccessarily inlude lesser included offenses, does the Due Process violation from the illegal sentence warrant any exception to the one-year filing limitations under the AEDPA?

"Actual Innocence" originally meant that the accused person did not, in fact, commit the charged offense. See e.g., Sawyer v Whitley, 505 US 333, 336 (1992); quoted in Dretke v Haley, 541 US 386 (2004); Murray v Carrier, 477 US 478 (1986)(actually innocent of the substantive offense). That meaning began to change when this Court expanded the term from "not guilty of" the charged offense to also mean "ineligible for the punishment assessed." Dretke, Id. at 393-394.

The Texas Court of Criminal Appeals unanimously held that a post-conviction application for a writ of habeas corpus is available when a felony conviction was rendered on a guilty plea when, in fact, the offense was a misdemeanor. Ex parte Sparks, 206 SW3d 680 (Tex.Crim.App. 2006); see also Ex parte Arnold, 574 SW2d 141, 142 (Tex.Crim.App. 1978).

Both the Texas high courts and this one have plainly established actual innocence applies to the charge convicted. Although Texas balks at the phrase "actual innocence" they do acknowledge the underlying principle. State v Wilsom, 324 SW3d 595, 598(Tex.Crim. App. 2010)("We hold that the term "Actual innocence" shall apply,

in Texas state cases, only incircumstances in which the accused did not, in fact, commit the charged offense or any of the lesser included offenses. In cases such as this one, in which the issue is the offenseof which he is, in fact, guilty, thus implicating the legality of his sentence, the appropriate terms are "guilty only of" a lesser-included offense and "ineligible for" the sentence assessed. For the purpose of this case, and other pending cases in which the issue is the offense of which the accused is, in fact, guilty, the sentence assessed, or both, we will interpret a claim of "actual innocence" to mean "guilty only of" a lesser-included offense or "ineligible for" the sentence assessed or both.")

Petitioner maintains his total innocence in the instant case. No evidence of actual guilt exist beyond the shaky testimony of the victim which in itself was overshadowed by the stigma of HIV at trial. However, in light of the verdict--however skewed by HIV--for the purposes of this brief, Petitioner argues that lesser-included offenses are irrelevant to the argument. Contrary to that, even if it is found that there was sufficient proof of guilt to the lesser-included offense, the petitioner asserts that he is ineligible for the sentence assessed (1st degree vs 2nd degree felony) or that he be only found guilty of a lesser-included. Due to the HIV stigma, for the purposes of a fair trial, the only course would be to remand for new trial.

In 2013, this Court granted certiorari to resolve a conflict among circuits on whether 28 USC §2244(d)(1) could be overcome by a showing of actual innocence. McQuiggins v Perkins, 569 US 383. The Court decided that it could. Id. at 397.

Actual innocence, if proven, serves as a gatewaythrough which a petitioner may pass whether the impediment is a procedural bar or expiration of the AEDPA's statute of limitations, as in this case.

Because petitioner has provided new, reliable, exculpatory scientific evidence that factually proves he did not, in fact, commit the crime in which he was convicted—he is then actually innocent of that crime. See Schlup, Id. (noting that for a claim to be credible it must be supported by new reliable evidence including exculpatory scientific evidence.)

Petitioner has provided scientific studies (Apendix A-D), laboratory reports (Appendix L), government declarations (Appendix E, F, M, N), and medical affidavits (Appendix G-I) to support his claim. Based on this undisputable evidence, had it been available to submit to the jury, it is more likely than not that no juror would have voted to convict. It is far more likely that had this scientific evidence been available at trial, the petitioner's HIV status would not have been presented to the jury to begin with as it would become irrelevant based on the untransmissibility of the petitioner's HIV. It is also more likely that Petitioner would not have faced the charge convicted at all as there would have been notdeadly weapon.

Petitioner also asserts that there is a difference between insufficient evidence and no evidence. Texas has argued that the claims made by the petitioner only amount to impeachment evidence and not new scientific evidence. This argument makes little sense in the light of how scientific methodology works.

Because the Petitioner has met the requirements of McQuiggins, he should be allowed to advance his claims on the merits and the district court erred in ruling petitioner as time-barred without full review of the petitioner's claims.

4. When does scientific hypothesis become scientific fact for the purposes of establishing factual predicate under the AEDPA (28 USC §2244(d)(1)(D))?

To begin, the AEDPA allows for a one-year filing limitation from the date on which the factual predicate of the claim presented could have been discovered through the excersize of due diligence.

The Petitioner's claim is that based on new science, his undetectable HIV viral load meant that he was not capable of transmitting the HIV virus and as such his bodily fluids were not capable of causing serious bodily harm or death.

The highest criminal court in Texas addressed how the evolution of science correlates to actual innocence in Ex parte Chaney (506 SW3d 239 (Tex.Crim.App. 2018)). Like in Chaney, the relevant science has considerably evolved since the time of the trial and these new scientif

these new scientific advancements contradict the science relied on by the state at trial (and in Petitioner's initial habeas). id. at 255.

The change in science as it relates to HIV transmissibility is apparant in the pleadings offered by the petitioner. In his initial state habeas, the science was that undetectability meant severely reduced risk of transmission, but the state countered that they only needed to show:

> "that applicant's HIV status and his bodily fluids [] were, in their use or intended use, capable of causing serious bodily injury or death. Regardless of the actual percentage of risk, in the underlying acts [], any risk of transmission of HIV to the victim renders Applicant's HIV tainted bodily fluids a deadly weapon." Ex parte Riley, No. WR-88, 409-01, Texas Court of Criminal Appeals, Respondent's Original Answer, Page 8 (Emphasis in the original)

By the time petitioner filed his initial federal habeas, scientists had adopted phrases such as "effectively no risk" and "near zero", which the state again deemed sufficient for a deadly weapon finding. (N.D.TX. ECF#28 Pgs 13-18).

On July 24, 2018, in explaining "What Zero Means", Dr. Alison Rodger who conducted the PARTER studies, stated, "it remains the case that the most likely probability, by far, that an HIV-positive person with a viral load under 200 copies/mL can infect their partner is zero." (Appendix D, Pg 4)

Then, on January 10, 2019, the top immunologist in the United States, Dr. Anthony Fauci, Director of the National Institute of Allergy and Infectious Disease—taking into account all of the science upto that point including the studies and peer reviews, s stated:

> "[E]ven though the clinical data underpinning the concept of U=U have been accumulating for well over a decade, it is only recently that an overwhelming body of evidence has emerged to provide the firm basis to now accept this concept as scientifically sound." (Appendix E, Page 4)

Like the evolution of science has changed, so has the factual predicate of the petitioner's claim. The Fifth Circuit defined factual predicate as "vital facts" underlying the claim. Flannagan v Johnson, 154 F3d 196, 199 (1998).

The vital fact of the petitioner's claim is precisely what was stated by Dr. Fauci on January 10, 2019. That based on studies,

publications, testing, and peer review—U=U is now scientifically sound. This means that as of January 10, 2019, the petitioner's claim that he was unable to transmit the HIV virus and thus negating the deadly weapon charge became scientifically sound.

There wasnt' a diminished risk of HIV transmission but rather ZERO risk at all: a vital element of the charge in which petitioner was convicted.

This finding leaves two options, that Petitioner is actually innocent of the charge in which he was convicted or that upon finding of proof of lesser-included offenses, that the petitioner is "only guilty of" the lesser-included offenses and thus ineligible for the sentence assessed.

In 2002, a petitioner was remanded for additional fact-finding when the petitioner's allegations were at odds with an assumption made by the district court and neither a hearing nor factual findings were made on the allegations. United States v Wynn, 292 F3d 226, 230-31 (5th Cir. 2002).

This is also the case here where the district court makes the assumption that the "earlier studies" were sufficient to make a finding of fact. The district court actually refused to consider the objections of the Amici placing it's own opinion over the expert knowledge of three HIV specialists. (Order by District Court, ECF#68, Pg 1*1). In the case of mixed statements, the district court should have ordered additional fact-finding or an evidentiary hearing to support their allegations or those of the petitioner. Phillips v Donnelly, 216 F3d 508, 511 (5th Cir. 2000).

As the vital fact of the petitioner's claim was firmly and finally established on January 10, 2019— that U=U, he should have been allowed to proceed under 28 USC §2244(d)(1)(D), failure to do so was a violation of the petitioner's rights to Due Process.

Reasons for Granting Review

The science surrounding HIV transmission has grown and evolved drastically throughout the time since the petitioner's trial. What we know now, what is undisputed fact as of January 10, 2019, is that a person living with HIV who has an undetectable viral load is untransmittable.

UNDETECTABLE = UNTRANSMITTABLE

This new science is beyond dispute by the state. It is accepted throughout the medical community and even the world's health organizations (CDC, NIH, NIAID, WHO, etc).

The Petitioner has proven that he was undetectable at the time of the offenses, that no deadly weapon existed and as a result he is unconstitutionally convicted under an offense that he did not, in fact, commit.

"Under our system of criminal justice even a thief is entitled to complain that he has been unconstitutionally convicted and imprisoned as a burglar." Jackson v Virginia, 443 US 307, 323-324 (1979). Justice Stewart understood that what is at the heart of the issue is the charge convicted and the sentence imposed as a result.

This Court established clearly that "an essential element of the due process guaranteed by the Fourteenth Amendment [is] that no person shall be made to suffer the onus of criminal conviction except upon sufficient proof—defined as evidence neccessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." Jackson, 443 at 316 (citing In re Winship, 397 US 358 (1970)).

The Petitioner has proven that except for the Constitutional violation (Allowing the deadly weapon element of his charge to stand) no jury could have convicted him of Aggravated Sexual Assault.

Petitioner is aware that the knowledge surrounding his claims, namely U=U, was not available at the time of the trial, but it is now.

Petitioner's Constitutional rights of due process, in being convicted by proof beyond a reasonable doubt of every element of his offense(s), should not be cast aside and disregarded by the procedural bad (filing limitations) of the AEDPA.

It can be surely said that Congress in passing the AEDPA in no way intended the legislation to supercede the rights granted to a person by the United States Constitution.

In 2022, there are over half of our states that prosecute individuals—citizens for nothing more than what now amounts to a chronic illness that when being treated, is not transmittable.

This Court has a duty and an obligation to end these senseless prosecutions. End HIV Criminalization. It can begin this process by granting certiorari to review the petitioner's claims in that HIV is not always a deadly weapon—as it certainly wasn't in this case.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE / SERVICE

I, Cody Jay Riley, hereby certify that the foregoing petition for writ of certiorari conforms to the rules set forth by this Court and was filed on the 9 day of December, 2022 by placing the document postage pre-paid into an institutional mailbox designated for legal mail at the Mark Michael Unit.

Cody Jay Riley, Pro Se