22-6959

No _____

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

THURSTON R.L. DAVIS - PETITIONER

V.S.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ON PETITION FOR WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS, 5TH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

THURSTON RICKEY LEE DAVIS

2101 F.M. 369 N. (ALLRED UNIT)

IOWA PARK , TEXAS 76367

QUESTION(S) PRESENTED

1). In an appeal of a 2254, at the "C.O.A." stage, when the U.S. District Court: accepts the affirmative defense of ' Statute of Limitation violation' that's intertwined with petitioner's ineffective assistance of counsel claim, denying habeas relief, as a summary judgment, did the 5th Circuit abuse it's discretion, when the court failed to focus on issues of "Time-barr" and "Summary judgment"?(the only issues addressed in the lower court's "C.O.A." determination).

2). Under the "A.E.D.P.A.'s" one-year statute of limitations, petitioner wasn't afforded the 6th Amendment's protection under Strickland v. Washington due to counsel filing a "Anders' brief" pursuant to Anders v. California, 87 S.Ct. 1396 (1967) indicating no "Notice" of all the facts that can be charged upon the attorney, not given to petitioner; was it an abuse of discretion of the district court to not find counsel's "Anders' brief", as a "impediment to filing an application" under 28 U.S.C. § 2244(d)(B)?

3). With regards to a no merits brief under Anders v. California, 87 S.Ct. 1396, can a claim of insufficiency of the evidence pursuant to Jackson v. Virginia, 443 U.S. 307 (1979), ever be "Wholly frivolous" or without merits?

LIST OF PARTIES

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TABLE OF AUTHORITIES

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

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.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.

1.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 12-2-22.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 1-27-23, and a copy of the order denying rehearing appears at Appendix E.

[ ] 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

** U.S. Const.Amend.6 (In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defence.) 8, 11, 12

* * U.S.Const.Amend.14, 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 life, liberty, or property, without due process of law; nor deny to any person within its jursidiction the equal protection of the laws.) 8, 12

**U.S.Const.art.6.,cl.2(This Constitution, and the Laws of the United States which shall be made in Pursunace thereof; and all Treaties made , or which shall be made, under the Authotity of the United State , shall be the supreme Law of the Land; and the judges in every State shall be bound thereby , any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.) 11

**U.S.Const.art.1,sect.9, cl.2(The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.) 11

Statement of the case

The district Court Granted Bobby Lumpkin's summary judgment[August 10, 2022]; Civil actionNo. H-21-3849; while issuing a separate jugment on July 22, 2022 where the court pursuant to Fed.R.Civ.Pro.8 determined petitioner violated statute of limitations without finding that petitioner counsel's "Anders brief", was in fact a impediment to filing an application, under 28U.S.C. § 2244(d)(B) & (D), Absent counsel to inform petitioner of those steps following up to the mentioned habeas corpus; petitioner Davis is distinguished for all U.S. SUpreme Ct Case law.

On appeal to the 5th Circuit [No. 22-20495] Petitioner satisfied the Standard for a "C.O.A."; however, the Circuit has only so far departed from the accepted and usual course of judicial proceedings, See, Tennard v. Dretke, 124 S.Ct. 2562, 2569 (2004). S.Ct.R. 10(a). In that the Circuit went beyond the standard, providing only lip-service, without focusing on the "Time-bar" and summary judgment, being the only issues directed/determined by the District court's order.See, Whitehead v. Johnson, 157 F.3d. 384 (CA 5 1998); Muniz v. Johnson, 110 F.3d. 10, 11 (Cir.5 1997).

Furthermore, the Circuit inappropriately determined petitioner "Waived" all claims, including the interwoven Ineffective assistance of appellate counsel and Time-bar, amounting as an abuse of discretion.

For these reasons, the present petition has been presented.

This petition shall incoperate Rule 20.1 Language in tandem with Rule 10 et al.

reasons for gratnting the petitioner

The present petition hails in to this Honorable Court from the posture of **Castro v. U.S.**, 1243S.Ct. 786, (2003), where the district court in a 2254 perpetrates abuses of discretions amounting to usurpation of powers, in that said court: (1) made a merit determination on petitioner's claims on July 22, 2022, (2) deeming petitioner "Time Barred" pursuant to 28 U.S. C. § 2244(d) and (3) without reviewing petitioner's distinguishability from those case laws clearly misapprehended upon petitioner.See[Appendix-(B) pgs. 11-15 citing **Gonzalez v. Thaler**, 132 S.Ct. 641, 653-54 (2012); Krause v. Thaler, 637 F.3d. 558, 561 (CA 5 2011).

Furthermore, the district court deemed petitioner shouldn't get equitable tolling, under **Holland v. Florida**, 130 S.Ct. 2549, 2562 (2010) (quoting **Pace v DiGuglielmo**, 125 S.Ct. 1807, 1814 (2005), without considering petitioner's position: proceeding on direct appeal not simply without counsel, but with no notice of any laws of facts, related to those laws called the "A.E.D.P.A.". See, **Smith v. Ayer**, 101 U.S. 320, 326 (1980); **Link v. Wabash R.Co.**, 370 U.S. 626, 634 (1962)("Under our system of representation[representative] litigation, each party is deemed bound by the acts of her/his lawyer-agent any is considered to have 'notice of all facts, notice of which can be charged upon counsel' "). See, **Gideon v. Wainwright**, 372 U.S. 335 (1963) and **Douglas v. California**, 372 U.S. 353 (1963); Also, **Griffin v. Illinois**, 352 U.S. 12, 20 (1956)(plurality opinion)("Fourteenth Amendment provides criminal defendant(turn) appellant a first right to appeal, the minimum safeguards necessary to make that appeal adequate and effective"); U.S.C.A. Const.Amend.6 & 14

Petitioner's counsel files an "Anders brief pursuant to **Anders v. California**, 87 S.Ct. 1396 (1967), those protections mentioned above have now been disrobed from petitioner. by the "anders brief" being for purposes of "the A.E.D.P.A."'s limitations found in 28 U.S.C. § 2244(d)(A-D).

THE ONE-YEAR STATUTE OF LIMITATIONS

The one-year limitation period runs from the latest of:

(A) the date on which the judgment became final by the conculsion of direct review or the expiration of the time for seeking such review;

B) the date on which the impediment to filing an application created by State action in violation of the Constituion of laws of the United State is removed, if the applicant was prevented from filing by such State act ion;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to case on collateral review; or

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

28 U.S.C. § 2244(d)(1). Needless to say, those limitations may be tolled or extended for the time during which a properly filed application for State post-conviction or other collateral review to a pertinent judgment is pending. 28 U.S.C. § 2244(d)(2). Petitioner didn't seek writ of certiorari in this Court, after Davis' conviction was affirmed by the intermediate court of appeals on December 19, 2019, right after petitioner's counsel filed an Anders brief,*1) leaving petitioner absent-minded of any rules, laws or the present statute being used against petitioner, only when petitioner was transferred to J.V. ALLRED-UNIT to met a jail-house lawyer did petitioner become aware of the "A.E.D.P.A." time limitation. 28 U.S.C. § 2244(D).

Petitioner contends and has contended below, that under the tolling clause of the Statute and specifically (B) and (D), Supreme Court Rules; namely: Rule 10 et al doesn't even come close to "speak" of the district court entering judgments on questions of Federal law. See Castro, places petitioner in a distinguishable posture

HOW THE WRIT SHALL BE IN AID OF THE COURT'S APPELLATE JURISDICTION

As mentioned above, the United States court of appeals for the Fifth Circuit has entered a decision that has so far departed from the accepted and usual course of Tennard v. Dretke, 124 S.Ct. 2562, 2569 (2004)(Giving lip-service to the "C.O.A." standard); Barefoot v. Estelle, 463 U.S. 880, 893 (1983)("...grounds dismissed on procedural grounds, a "C.O.A." must be issued..."), in requiring petitioner to brief every issue when the district court first made a "time barr" determination followed by summary judgment

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*1). Petitioner contends that a Anders' brief falls under 28 U.S.C. § 2244 (d)(B); See Strickland v. Washington, 104 S.Ct. 2052(1984)

motion being granted 19 days later, sanctioned a downward departure, as to call or an exercise of this Court's supervisory power.S.Ct.R.10(a). Petitioner contends that **Barefoot** granted a "C.O.A." once time bar was determined and petitioner could only brief that issue with summary judgment's abuse of discretion, contrary to the circuit's waiver of grounds conclusion of law, happening to be inconsistent with facts and law.

EXCEPTIONAL CIRCUMSTANCE WARRANT THE EXERCISE OF THE COURT's DISCRETIONARY POWER

Here Federal Rule of Appellate Procedures 47 provide adequate underlying legal authority for the procedural practice.*2). It suggests that this Court has the authority to regulate the practice,[The **Barefoot** procedural rule and issuing two judgments(one on the merits and a summary judgement)], the exercise of the supervisory powers over the Federal Judiciary. **McNabb v. United States**, 318 U.S. 332, 340-412(1943); **Messenger v. Anderson**, 225 U.S. 436, 444 (1912). Needless to say,, the **Barefoot** Standard doesn't fall under Rule 47 because as the Court said:" ...The procedures adopted to facilitate the orderely consideration and disposition of habeas corpus petitions" citing **Lambert v. Barrett**, 159 U.S. 660, 662 (1895), is inconsistent with any absence of controlling law, See **Barefoot**, 463 U.S. at 889; and for these reasons the United States court of appeals has decided an important question of federal law that has been way conflicted with relevant decisions of this Court. S.Ct.R.10(c);See, 28 U.S.C. § 2071(c)(1) (" A rule of the District court prescribed under subsection (a) shall remain in effect unless modified or abrogated by the judicial council of the relevant circuit.").

Whereas, the summary judgment, being a "interlocutory appeal should have challenged the genuineness of the fact issue".See **Johnson v.Jones**, 515 U.S. 304, 307 (1995)

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2). Federal Rules of Appellate Procedure 42 (b) **Procedure When There Is No controlling Law.** A Court of Appeals May regulate practice in a particular case in any manner consistent with federal law, these rules , and local rules of the circuit . No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement, See, 28 U.S.C. § 2072(a)(" The Supreme Court shall have the power to proscribe generla rules of practice and procedure and rules of evidence for cases in the United States district courts[including proceedings before magistrate judges thereof] and courts of appeals.")

Also, termed in the Anders sense "without merits" or frivolous.*3).

With regards to a no merits brief under Anders v. California, 87 S.Ct. 1396, can a claim of insufficiency of the evidence pursuant to Jackson v. Virginia, 443 U.S. 307 (1979), ever be "Wholly frivolous" or without merits?

Given the nature of what "a federal habeas court must consider not whether there was any evidence to support a state conviction , but whether there was sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt. **In re Winship**, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368,; Jackson, Supra, ; see, **Thompson v. Louisville**, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed. 2d 654("...no evidence rule"), this Court shall think it clear that the constitutional right cognizable on habeas cannot be either "wholly frivolous" nor "without merits" , for it through Thompson explicitly stated that the due process right at issue did not concern a question of evidentiary 'sufficiency'. 362 US at 199, Winship did on the other hand apply due process decisively determining the difference between criminal culpability and civil liability.

The present writ draws the line in the legal landscape of Anders-Jackson- McCoy v. Court of Appeals, 486 U.S. 429 (1988) and clashes with 28 U.S.C. § 2244 and a state procedural bar; which is now an invited error of Texas,, via Anders. The writ shall issue to address the Castro posture that rule 10 et al speaks not of in the explicit.

Under the "A.E.D.P.A.'s" one-year statute of limitations, petitioner wasn't afforded the 6th Amendment's protection under Strickland v. Washington due to counsel filing a "Anders ' brief" pursuant to Anders v .California, 87 S.Ct. 1396 (1967) indicating no "Notice" of all the facts that can be charged upon the attorney, not given to petitioner; was it an abuse of discretion of the district court to not find counsel's "Anders' brief", as a "impediment to filing an application" under 28 U.S.C. § 2244(d)(B)?

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*3). What is required is a determination that the appeals lack any basis in LAW OR FACT. CF:"... Claims are 'frivolous' when lacking basis in BOTH LAW AND FACT...", Lewis v. Casey, 518 U.S. at 353n.3. This Court, should determine whether "and or or" resolves the issue.

Needless to say; more importantly, how a State court of last resort may procedurally default a cognizable Jackson v. Va claim contrary to the **Supremacy Clause**, U.S.Const.Art.6, Cl.2, now tantamount to violating the **Suspension Clause**, U.S.Const.Art.1,9,Cl.2 calling for this Court's Supervisory power. S.Ct.R.10(a).

The present writ has distinguishabilities beyond Rule 10 et al and turns 2254 on its head. In that, petitioner Davis brings an "Anders brief" in a State direct appeals; while the State resolves petitioner's insufficiency of evidence claim on direct review under either "Wholly frivolous" or "without merits". On State habeas review, Davis' Jackson v. Va claim is deemed 'procedurally barred' however, Davis' Jackson claim was raised and rejected as a record based claim; meaning; record based claims surpass any procedural default, under Texas law * 4). Needless to say, the present question maybe restated as followed:

QUESTION RESTATED:

MAY A SUFFICENCY OF THE EVIDENCE CLAIM EVER BE "wholly frivolous" or "without merits"?

QUESTION RESTATED:

May states weaponize "Anders briefs" against habeas petitioners to either procedurally bar or time bar Jackson v. Va sufficiency of the evidence challenges to a conviction claims?

These questions this Court shall answer in favor of petitioner in the positive by looking to either 2254, the 6th and 14th Amendments, or those applicable laws and case laws related. The writ shall issue.

In an appeal of a 2254, at the "C.O.A." stage, when the U.S. District Court; accepts the affirmative defense of ' Statute of limitation' that's interwined with petitioner's ineffective assistance of counsel claim, denying habeas relief, as a summary judgment, did the 5th Circuit abuse its discretion, when the court failed to focus on issues of "time-bar" and "summary judgment"?(the only issues addressed in the District court's "C.O.A." determination.).

The Fifth Circuit, has repeated its shortcoming from Tennard,supra, in that it failed to analysis the District court's analysis of the Texas court's decision. ID. @ 124 S.Ct. 2569. Davis, has demonstrated that "reasonable jurist would find the district court's assessment of

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*4).[Appendix-(C) pg.5 citing Ex Parte Grigsby, 137 S.W.3d 673, 674 (TX. CR.APP. 2004)("... sufficiency of the evidence is not cognizable on habeas..."), See, 2254(d)(1)("... contrary to...unreasonable application of..."); Jackson v. Va, 443 U.S. at 324("... sufficiency of the evidence is cognizable...")

the constitutional right[claim][*5]. debatable " . in this case, the issue is whether a Jackson v. Va, claim is debatable or could the district court decide another way, via another 'reasonable jurist", in this case, Davis cited and qouted Ex Parte Williams, [*6]. by doing so, the Circuit has decided an important federal question in a way that conflicts with Barefoot, Slack, Tennard, Jackson, and Castro.S.Ct.R. 10(c); which now departs from those 'accepted and usual judical proceedings', as to sanction futher departures, as to call for the exercise this Court's "supervisory power"S S.Ct.R. 10(a). The writ shall issue.

ADEQUATE RELIEF CANNOT BE OBTAINED IN ANY OTHER FORM OR FROM ANY OTHER COURT

Petitioner Davis has filed in the Texas court of last resort [Appendix-(C)]; filed in the District court [Appendix-(A)] and has been denied a "C.O.A." in the Fifth Circuit [Appendix-(B)]. Issuance may be found through 28 U.S.C. 1651(a), 28 U.S.C. § 2101(e), S.Ct.R. 10(a-c), and S.Ct.R. 20.1-4. Lastly, the writ is timely. The writ shall issue.

CONCLUSION

The writ is respectfully requested to issue.

Thurston R,L. Davis

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*5). Slack v.McDaniel, supra,.See,.28 U.S.C. § 2253(c)(2)("...made a substanial showing of the denial of a constitutional right..").

*6). 703 S.W.2d 647, 677-78 (Tx.Cr.App. 1986)("...this is the rule where the defendant throught out insist that he is innocent and has plead Not Guilty.... where the plea is not guilty , the burden of proof is upon the State beyond a reasonable doubt.")(citing Ex Parte Lyles, 168 Tex. Crim.145, 323 S,W.2d 950 (1959).