No. 23-5250

IN THE

SUPREME COURT OF THE UNITED STATES

JALEEL BERTRAND FRANKLIN — PETITIONER
(Your Name)

vs.

BOBBY LUMPKIN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

Jaleel Bertrand Franklin #2129734
(Your Name)

Robertson Unit, 12071 F.M. 3522
(Address)

Abilene, Texas 79601
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1 **(a)** Whether counsel's statements are entitled to "double deference" or a presumption of correctness when such are premised entirely upon a logical fallacy?

(b) And whether such is debatable amongst jurists of reason entitling Petitioner to a Certificate of Appealability?

2 Whether it is debatable amongst jurists of reason that the State Court's denial is entitled to deference when Petitioner's inability to prove racial makeup of venire panel was caused by State-created barrier?

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 the subject of this petition is as follows:

RELATED CASES

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OTHER

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 A 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[X] is unpublished.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 B 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[X] is unpublished.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[ ] is unpublished.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[ ] is unpublished.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was 23rd February 2023.

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

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, 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. § 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

28 U.S.C. 2254(e)(1)

In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

In his petition for writ of habeas corpus to the District Court, Petitioner raised two grounds for relief:

1. His Fourteenth Amendment equal protection rights were violated when a racially biased jury was empaneled due to African Americans being least likely to be selected; and,

2. His attorney was ineffective when he failed to object to the State's gender-racial biased peremptory challenges or request a jury shuffle.

Petitioner asserts that all African Americans in the venirepanel were seated outside the probable juror range.
Counsel states in his affidavit that he notes on the seating chart the race or ethnicity of each prospective juror, and that this seating chart was surrendered to the bailiff after the completion of jury selection.

The trial court concluded (and the District Court accepted) that because trial counsel did not request a jury shuffle, he reasonably believed that there were other African American panel members within probable juror range and that counsel's decision not to request a shuffle was the result of his reasoned trial strategy.

Pursuant to 28 U.S.C. 2254(e)(1) the District Court afforded AEDPA deference to ~~the~~ State habeas court's findings and denied relief. Petitioner petitionered the Fifth Circuit for a Certificate of Appealability, however Petitioner's request was denied.

Petitioner now files this Petition for Writ of Certiorari. Thank you.

REASONS FOR GRANTING THE PETITION

1 **(a)** Whether counsel's statements are entitled to "double deference" or a presumption of correctness when such are premised entirely upon a logical fallacy?

(b) And whether such is debatable amongst jurists of reason entitling Petitioner to a Certificate of Appealability?

The United States Court of Appeals for the Fifth Circuit has entered a decision in conflict with the decisions of another United States Court of Appeals, and numerous state courts of last resort; as well as so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power [RULE 10(a)].

This case presents a question about the acceptance of logical fallicies in judicial proceedings. This issue is of great public importance because the acceptance and use of logical fallacies in judicial proceedings directly effects the intehrity and accuracy of said proceedings. This is because when logical fallacies creep into our adversary process it corrodes the very foundation upon which the institution of justice rests.

The following case is thus: During his state habeas corpus, Petitioner Franklin alleged that he received ineffective assistance of counsel by failing to request a jury shuffle because all African American prospective jurors on the venirepanel were seated outside the probable juror range.

In response to this claim, counsel admits that: "I do not remember how many African Americans were on this panel nor where they were seated" (Affidavit of Fred Cummings at 3) and that "it is unknown now, more than 3 years later, if any of those prospective jurors were African American" (id at 4). However, counsel argued in his affidavit that he "would have requested a shuffle if the only African Americans on the panel had been seated outside the range of potential strikes"(id at 3; Opinion and Order at 13).

Based upon counsel's affidavit, the state habeas court concluded (and the District Court accepted) that because "trial counsel did not request a jury shuffle, he reasonably believes that there were other African American panel members within probable juror range" (FFCL at no. 21)
Thus, the court reasoned, "counsel's decision not to request a shuffle was the result of his reasoned trial strategy" (Opinion and Order at 13).

The rationale used to justify why counsel did not request a jury shuffle and, by extension, the conclusion that there were subsequently African Americans within the probable juror range is a **LOGICAL FALLACY.**

As this Court likely knows, a "logical fallacy" is an error in logic. It is often based upon a plausible argument, but uses a false or invalid inference. The logical fallacy in this case is a type of "non sequitur" - that a negative can be used to prove a positive. Specifically, that because counsel did not request a jury shuffle (negative) it proves there were African Americans within the probable juror range (positive).

Although it was apparently counsel's general practice to note prospective juror's race or ethnicity when they were seated, it is an invalid inference to conclude there were African Americans within the probable juror range premised on the fact he did not request a jury shuffle. A multitude of variables could have caused counsel to overlook or miss the racial makeup of the venirepanel. Therefore, such reasoning falls afoul of a logical fallacy - the inference does not follow from the premise.

For at least the past century, this Court has expressly rejected arguments that rest entirely on a logical fallacy. See, Silvester v. Becerra, 138 S.Ct. 945 (2018) ["In fact, the Ninth Circuit's 'common sense' conclusion was a logical fallacy... By assuming that a conclusion about the whole applies to each of its parts, the Ninth Circuit committed the 'fallacy of division'. See, P. Nurley, A Concise Introduction to Logic, 170-172 (6th ed 1997)"]; Cuomo v. Clearing House Ass'n, LLC, 129 S.Ct. 2710, 2720 (2009) [rejecting an argument in which its "fundamental contention... rests upon a logical fallacy"]; Spencer v. Texas, 385 U.S. 554, 578 (1967) ["The court has fallen into the logical fallacy sometimes known as the fallacy of the undistibuted

middle"]; Schall v. Camors, 251 U.S. 239 (1920) ["The line of argument of the case... is a very clear illustration of the logical fallacy known as reasoning in circles"].

Rightly so, other courts across this nation have also rejected various logical fallicies as valid legal arguments. See, VMG Salsoul, LLC v. Ciccone, 824 F.3d 871 (9th Cir. 2016) ["In logical terms, it is a fallacy to infer the inverse of a condition from the condition. E.g. Joseph G. Brennan, A. Handbook of Logic, 79-80 (2d ed. 1961)"]; CIC Servs, LLC v. IRS, 925 F.3d 247, 263 (6th Cir. 2019) [Plaintiffs "argument appears to fall afoul of the fallacy referred to as 'denying the antecedent'. Stated abstractly, it means one is wrong to assume that because a conditional premise is true, so is its inverse"]; McClain v. Metabolife Intern, Inc, 401 F.3d 1233, 1242-43 (11th Cir. 2005) ["Expert opinions based upon nothing more than the logical fallacy of post hoc ergo propter hoc typically do not pass muster under Daubert"]; Rolen v. Hansen Beverage, co., 193 F. Appx 468, 473 (6th Cir. 2006) [same]; Young v. Burton, 567 F. Supp.2d 121 (DC 2008) ["Drawing conclusions about causation from temporality is a common logical fallacy known as post hoc ergo propter hoc (after the fact, therefore because of the fact), and is as unpersuasive in the courts as it is in the scientific community"]; Herring v. Colvin, 2016 U.S. Dist. LEXIS 78312 (E.D. Iowa 2016) ["This argument fails as a logical fallacy, and also fails as a matter of fact and law"]; Roop v. Desousa, 2023 U.S. Dist. LEXIS 40247 (E.D. Virginia 2023) ["The Court rejected the idea that the jury be allowed to apply the logical fallacy of post hoc, ergo propter hoc"]; Ricks v. City of Alexandria, 2014 U.S. Dist. LEXIS 121244 (W.D. Louisiana 2014) ["just because a rooster crows in the morning does not mean the crow caused the sun to rise"].

Even state courts in Texas have rejected logical fallacies. See, Paulson v. State, 28 S.W.3d 570, 572 (Tex. Crim. App. 2000) ["That is like saying, 'pneumonia makes you cough; therefore, if you cough, you have pneumonia'. This is the logical fallacy called 'affirming the consequent'"]; Jelinek v. Casas, 328 S.W.3d 526, 533 (Tex. 2010) ["Care must be taken to avoid the post hoc ergo propter hoc fallacy, that is, finding an earlier event caused a later event merely because it occurred first. Stated simply, correlation does not necessarily imply causation"]; Daniels v. Empty Eye, inc, 368 S.W.3d

743, 752 (Tex. App. - Houston [14th Dist.] 2012) ["Such an inference would not be logical, but instead would be an example of the logical fallacy known as 'affirming the consequent'"].

Surely these cases show that jurists of reason would find it debatable whether a statement by counsel which rests entirely upon a logical fallacy should be entitled to "double deference" or a presumption of correctness.

For these reasons this Court should grant Certiorari and exercise its supervisory powers by providing explicit guidance on how courts should feal with logical fallacies and their evidentiary status in our adversary process.

2. Whether it is debatable amongst jurists of reason that the State Court's denial is entitled to deference when Petitioner's inability to prove racial makeup of venire panel was caused by State-created barrier?

The United States Court of Appeals for the Fifth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court [RULE 10(c)]. It has also so far departed from the accapted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power [RULE 10 (a)].

As counsel openly admits in this case: "it is unknown... if any of those prospective jurors were African American" (Affidavit of Fed Cummings at 4). Pursuant to 28 U.S.C. 2254(e)(1) the District Court afforded AEDPA deference to the state habeas courts findings that Petitioner "has failed to [show] that the makeup of the venirepanel was racially discriminatory" (Opinion and Order at 13-14).

However, Petitioner was prevented from obtaining any documents establishing the racial makeup of the venire panel by two insurmountable statutory obstructions working in concert. These ststutory obstructions are as follows:

A) Texas Government Code 552.028 is part of the Texas Public Information Act and allows governmental bodies to simply ignore all requests for information from any person incarcerated in an institution, even if that person offers to pay for such information. Government bodies in Texas routinely ifnore such requests and cite 552.028 broadly to deny prisoners the information they seek for their habeas corpus applications.

B) Texas Code of Criminal Procedures, article 39.14(f) specifically prohibits an attorney from providing a prisoner with a copy of the "discovery" items in their case or the content of their case file or client-attorney file (other than the prisoners own statement). See, In re Powell, 516 S.W.3d 488 (Tex. Crim. App. 2017).

Because Texas does not recognize the right to habeas counsel in initial-review collateral proceedings raising a claim of ineffective assistance, §552.028 and 39.14(f) work in concert to deny prisoners the evidence necessary to prove their claims in an application of habeas corpus.
The question must be asked: How is Petitioner Franklin, as an unrepresented prisoner, meant to prove the racial makeup of the venirepanel if he is prevented by both statute and his physical confinement from obtaining the necessary documentation? The obvious answer is that he cannot.

Furthermore, the seating chart inwhich counsel allegedly marked the race or ethnicity of each prospective juror was surrendered to the bailiff after the completion of jury selection (Affidavit of Fred Cummings at 4; FFCL at no. 23). This document was in the custody of the Court and thus should have been part of the record. review of this document would have proven the racial makeup of the prospective jurors.

As explained above, Petitioner Franklin had no ability or right to obtain and thus present this document because of the State-created barriers. The Court did not sua sponte review the surrendered seating chart within their custody, and then subsequently penalize Petitioner Franklin for not showing the makeup of the venirepanel was racially discriminatory.

Under such circumstances, teh merits of te factual dispute (whether there were actually African Americans within prospective juror range) were not resolved in the State hearing, and the fact-finding procedure employed by the State Court was not adequate to afford a full and fair hearing. An evidentiary hearing by the district court was therefore warranted to determine the factual issue of the racial makeup of the venirepanel. Townsend v. Sain, 83 S.Ct. 745 (1963).

Petitioner has clearly alleged facts which, if true, would entitle him to rlief - and thus, it is debatable amongst jurists of reason whether the State Court's denial is entitled to deference when Petitioner's inability to prove racial makeup of venirepanel was caused by State-created barrier.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Gabriel Hernández

Date: 22nd April 2023