23-6810

No.

In The

Supreme Court of the United States

LARRY D. MOSLEY Petitioner,

v.

PHILLIP A. WHITE, Warden, Respondent.

On Petition For Writ Of Certiorari
To The Fourth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

Larry D. Mosley, pro se
3521 Woods Way
State Farm, Virginia 23160

QUESTIONS PRESENTED

1. Did the federal court's ruling on Mosley's Ineffective Assistance of Counsel claim deny Mosley equal protection where the court had before it an evidentiary record to support Mosley's claim, but ignored it?

2. Was defense counsel Ineffective in his pretrial, trial and, post trial conduct? The investigative phase, trial phase and, post conviction assistance. This, in violation of the petitioner's Sixth and Fourteenth Amendment Rights under the United States Constitution.

3. Should the federal court have allowed the claims designated C(1) - C(6) - E(1) - and E(2) to be viewed on their merits as, it was the erred ruling of the state court which caused the alleged default of the claims?

4. Did the federal court ruling on Mosley's Trial Court's Abuse of Discretion claim, deny Mosley's equal protection and Due Process rights? The evidentiary record does show that the trial court's conclusion that pro se motion and counsel's motion were not the same in content as; pro se motion did include claims of Prosecutorial Misconduct and Police Misconduct. Not allowing an argument for the record on said claims is the reason for claim of Court Abuse of Discretion.

STATEMENT OF THE CASE

On December 2, 2014 the petitioner was arrested for malicious wounding and charge was later changed to second degree murder. In violation of § 18.2-32.

On November ninth and November tenth, petitioner was tried in the Circuit Court for the City of Lynchburg, Virginia by jury. Upon a finding of guilt an appeal was noted and filed to the Court of Appeals for Virginia. The appeal raised four issues. The Court of Appeals denied the appeal on May 12, 2017, and it was requested to be heard by a three judge panel. The three judge panel denied the appeal on September 20, 2017. Appellate counsel failed to appeal to the Supreme Court of Virginia. Petitioner filed a writ and was granted a belated appeal because of counsel's failure. Same counsel was appointed to perfect the belated appeal. Counsel at this time only raised one issue in the belated appeal to the Supreme Court of Virginia. The high court refused this petition for appeal on July 16, 2019. Mosley v. Commonwealth, no. 181646 (Va, July 16, 2019).

The petitioner filed a state habeas petition on May18, 2020, raising 9 allegations of ineffective assistance of trial counsel, 2 claims of ineffective assistance of appellate counsel, 13 claims of prosecutorial misconduct, and 3 claims of police misconduct, and 3 claims of trial court abuse of discretion violating his rights. A motion to dismiss was filed by the respondent with an affidavit from trial counsel attached to the motion. The habeas trial court granted the motion to dismiss the habeas petition in an opinion entered July 20, 2020.

The initial state habeas petition which was filed on May 18, 2020 was filed during the Covid Pandemic and all access to legal material was cut off. The petition was filed not being able to obtain the needed names and exhibits to perfect the petition. In 14A. of the writ form where in the claim of ineffective assistance of trial counsel was cited, it was duly noted by the petitioner that he did intend to amend the writ with the needed information to fully state the claims. The trial court did not acknowledge this stated intent and, denied the petition as noted, on July 20, 2020.

Unbeknownst to the petitioner, in March of 2020 both state and federal courts were operating on the special directive or executive orders in each jurisdiction. The filing deadline that was being met by the petitioner had been lifted.

Upon appealing the trial court's decision the petitioner did send to the Virginia Supreme Court 13 documents which clearly showed the efforts of the petitioner as far back as March of 2020, attempting to obtain the needed information. That appeal and the motion to amend the trial court petition was denied without considering the merits of the amended claims of the motions included. That has set in motion the decisions which have come from the federal court. Who has agreed with the trial court that there has been nothing but conclusory claims made by the petitioner. SEE Appendice L .

The petitioner did timely file his 2254 petition

1. Citing 8 claims of ineffective assistance of trial counsel
2. Citing 2 claims of ineffective assistance of appellate counsel
3. Citing 6 claims of prosecutorial misconduct
4. Citing 2 claims of police misconduct
5. Citing 2 claims of abuse of discretion by the Trial Court

The petitioner executed his current, timely-filed federal petition for writ of habeas corpus on October 25, 2021.

The United States District Court for the Western District of Va. denied the petition on October 28, 2022, and in doing so, agreed with the trial court in its concluding that the claims were conclusory in part and unexhausted and defaulted. This being possible because of the VA Supreme Court's failure to allow the amending of the trial court petition which was in fact slighted because of the Covid Pandemic and the breakdown in the legal process.

The petitioner then filed an appeal to the United States Court of Appeals for the Fourth Circuit. Appeal filed on February
Appeal to the Fourth Circuit Court of Appeals was denied on October 12, 2023. A Mandate to that effect was issued.

The petitioner is now seeking Certiarori in the United States Court of Appeals.

REASONS FOR GRANTING THE PETITION

[RELATIVE TO QUESTION ..1.]

1. The petitioner is relying on the reasoning found in: Vasquez v. Hillary, 474 U.S. 254, 260 (1986) holding, "The state fact finding process is undermined where the state-court has before it, yet, appearantly ignores evidence that support petitioner's claim"), and in Miller v. Cockrell, 537 U.S. 322, 348 (2003)(reasonableness of state court factual finding assessed "in light of the record before the court)"., believes that the state court has failed to render a fair and ruling in the present case.

BECAUSE OF THE ERROR OF THE STATE-COURT RULING, THE FEDERAL COURT HAS CONTINUED THE SAME FLAWED REASONING EMPLOYED BY THE STATE-COURT.

What the record shows is: the petitioner did file a writ petition to the trial court on May 18, 2020. Due to the Covid Restrictions placed on the institution the petitioner was unable to obtain particulars needed in his petition. The petitioner did note at 14.A in claim of Ineffective Assistance of Counsel, that he intended to amend said claims in petition. The trial court however denied petition on July 17, 2020 while never allowing for amending of petition.

The petitioner did file a timely appeal to the Virginia Supreme Court.

The following was included in the petition filed to the Virginia Supreme Court.

1. MOTION TO AMEND CIRCUIT COURT PETITION
2. AMENDED PETITION (which included all information in dispute at this stage of the appeal process., to include all exhibits to validate claims in petition).
3. ASSIGNMENT OF ERROR(S)
4. MOTION FOR APPOINTMENT OF COUNSEL
5. MOTION FOR FORENSIC EXAMINATION OF EVIDENCE (a blanket)

THE PETITIONER PRESENTED 13 SEPERATE EXHIBITS WHICH DATED FROM MARCH OF 2020 to SEPTEMBER OF 2020 TO SHOW THE EFFORTS BEING MADE TO OBTAIN THE INFORMATION NEEDED TO BE INCLUDED IN THE TRIAL COURT PETITION. (See Appendice M)

The petitioner here cites from United States ex rel. Hampton v. Leibach, 347 F.3d 219, HN2 Exception to Default, Cause & Prejudice Standard : A petitioner's failure to develope the factual basis of his claim in state court will bar expansion of the record in federal court "only" if this failure was due to a lack of diligence or some greater fault attributable to the petitioner himself. The relevant inquiry is thus not simply whether the petitioner theoretically could have discovered the evidence while he was still in the state forum, but whether he made appropriate efforts to locate and present that evidence to the state courts.

The exhibits submitted to the Virginia Supreme Court and, the motions included serves as proof of the efforts made on the behalf of the petitioner to present that evidence to the state courts.

As cited in Vasquez ..."The state fact finding process is underminded where the state court has before it, yet, [illegible] appearently ignores evidence that supports petitioner's claim.

THE PETITIONER BELIEVES THAT THE COURT HAS FAILED TO PROVIDE HIM EQUAL PROTECTION BECAUSE THE VIRGINIA SUPREME COURT DID NOT CONSIDER THE PETITION PLACED BEFORE IT AS THERE WAS NO ARGUMENT ON THE MERITS AT THIS STAGE OF THE APPEAL. INSTEAD, ONLY AGREEING WITH THE FINDINGS OF THE TRIAL COURT.

Had the trial court allowed the petioner to amend his petition or, if the Virginia Supreme Court had considered the amended petition which it did receive, the names of witnesses and other information which is now being declared missing from petitioner's claims would be available for consideration by this court.

When a habeas petitioner has not fully developed the factual basis for his claim in state court, it is the federal court that must decide whether that omission forecloses expansion of the record pursuant to 28 U.S.C.S. § 2254(e)(2).. but when the reason is not self-evident from the state record, nothing in § 2254 (e)(2). precludes the petitioner from supplying the explanation when he arrives in federal court.

The petitioner did provide a thorough explanation of the shortcomings of the trial court petition but, the federal courts responses have not considered the explanation.

[RELATIVE TO QUESTION...2.]

2. Was trial counsel ineffective for failing to have witnesses present for petitioner's trial after being given the names and a summary of what these witnesses could testify to?

Counsel was in possession of the names of potential witnesses, Mutts, Turner, Franklin and the business name of the physical therapist, the three first responders who were asked of counsel to have present at trial. This claim is easily verifiable by examining the Appendices, G-1, G-2, G-3, G-4, J-1, J-2, J-3, J-4.

The first four are counsel's own hand written notes with the dates upon which the names were given to him by the petitioner. The others are subpoenas drawn up by counsel prior to trial. Counsel never contacted any of these witnesses and, he did not have any one of them present in court for trial.

THE PETITIONER HAVE SHOWN THAT THE STATE COURT HAVE NOT CONSIDERED ALL OF THE FACTS PRESENTED BEFORE IT, AND, REACHING AN UNFAIR JUDGEMENT. COUNSEL DID FAIL AS A MATTER OF LAW TO PROTECT THE RIGHTS OF THE PETITIONER. COUNSEL DID FAIL TO CONTACT, INTERVIEW AND, MAKE A RATIONAL DETERMINATION FOR WHO TO SUBPOENA AS WITNESSES FOR THE DEFENSE.

WITHOUT ANY JUSTIFIABLE REASON FOR DENYING WITNESSES COUNSEL HAS VIOLATED THE PETITIONER"S SIXTH AND FOURTEENTH AMENDMENT RIGHT.

HN8: STANDARDS, STANDARDS OF REVIEW:

A state-court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case certainly would qualify as a decision involving an unreasonable application of clearly established federal law. Unreasonable means something more than mistaken, however. A state-court decision is unreasonable for purposes of 28 U.S.C.S. § 2254 (d)(1). if its application of United States Supreme Court precedent lies well outside the boundaries of permissable differences of opinion. The court's task is to uphold those outcomes which comport with recognized conventions of legal reasoning and set aside those which do not.

By arguing that counsel have the right to decide what witnesses to call to testify (at trial), the state has made a reasonable statement, However the claim to which this response was given was, a claim that counsel failed to investigate the potential witnesses. Thereby failing to even compel witnesses for the defense after he had been told to do so. This matter is more about how to properly prepare for trial, not how it is to be conducted after commencing.

HN12: CRIMINAL PROCESS, ASSISTANCE OF COUNSEL

The duty to investigate derives from counsel's basic function, which is to make the adversarial testing process work in the particular case. Because that process generally will not function properly unless counsel has done some investigation into the prosecution's case and into various defense strategies. The United States Supreme Cout has noted that counsel has a duty to make reasonable investigations or to make reasonable decisions that make particular investigations unnecessary.

HN13: CRIMINAL PROCESS, ASSISTANCE OF COUNSEL

Strategic choices made after thorough investigation of law and facts relevant to plausable options are virtually unchallengable via an ineffective assistance of counsel claim. However, strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgements support the limitations on investigation. Although there may be unusual cases when an attorney can make a rational decision that investigation is unnecessary, as a general rule an attorney must investigate a case to provide minimally competent representation.

HN14: CRIMINAL PROCESS, ASSISTANCE OF COUNSEL

Counsel has a duty to contact a potential witness unless counsel can make a rational decision that investigation is unnecessary.

In the present case counsel did not contact any of the seven potential witnesses named by the petitioner. He did however, draw up subponas for four of them. Since there were no witnesses called for the defense it can be assumed that the subpoenas were not served. This acknowledges that there were witnesses requested. There is no rational tactical decision to be claimed by counsel for their absence at trial. Denying having knowledge of any witnesses for the defense that were not presented does not relieve counsel of the responsibilities which were conferred upon him by the 6th Amendment to the United States Constitution.

Counsel have violated the petitioner's Sixth and Fourteenth Amendment right to have witnesses to testify on his behalf.

In Evans v. Florida DOC, 699 F.3d 1249 CA11 2012), at pg. 1268 the court concluded; Counsel clearly made an informed decision about not presenting any witnesses during the guilt phase, which is exactly what he told the judge at the guilt phase: After a year and a half of consultation, followed by the last few minutes here, we're going to rest.... Because the trial court's finding are supported by competent substantial evidence and counsel's decision not to present these witnesses was reasonable, we affirm the trial court's denial. The court also noted: Counsel also testified that he did not believe that any of these witnesses, who had credibility or other problems associated with their testimony, was worth giving up the"sandwich," i.e. losing the opportunity to give two closing arguments at the guilt phase.

In the present case however, counsel has made no such determinations in regards to why he did not either investigate, or call any of the potential witnesses.

In his sworn affidavit to the court he simply states he is not aware of what witnesses the defendant is talking about. In the process contradicting his own notes which shows that he was given the names of potential witnesses

Lawrence v. Armontruot, 900 F.2d 127 (CA8 1990) pg.129. We believe that once Lawrence provided his trial counsel with the names of potential alibi witnesses, it was unreasonable of her not to make some effort to interview all these potential witnesses to ascertain whether their testimony would aid an alibi defense. In Tosh v. Lockhart, 879 F.2d 412, 414 (8th Cir. 1989)(failure to make reasonable effort to procure testimony of alibi witnesses constituted

deficient performance). In Strickland v. Washington,466 U.S. 668 at 693.. The court reasoned, " we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case. This outcome-determinative standard has several strengths....Nix v. Whiteside, 475 U.S. 157 at 175 " We hold that,as a matter of law, counsel's conduct complained of here cannot establish the prejudice required for relief under the second strand of the Strickland inquiry. Although a defendant need not establish that the attorney's deficient performance more likely than not altered the outcome in order to establish prejudice under Strickland, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."
Also under Strickland standard, a failure to locate and speak with potentially favorable witnesses can be excused only if the decision not to look for such witnesses was itself reasonable.

In the present case counsel's only statement(s) in regard to the requested potential witness is a denial of knowledge of the alleged potential witnesses. Seen in counsel's affidavit in response to trial court writ of habeas, counsel stated;.."I do not know what witnesses Mr. Mosley requested that were not presented... there are no witnesses that I can recall that would have given testimony benificial to Mr. Mosley's defense". Habeas record at 54.

Seen as Appendices ,G-1 ,G-2 ,G-3 ,G-4 are counsel's own hand written notes which were entered as exhibits to the lower courts.

The denial of counsel found in the sworn affidavit as stated above is plainly contradicted and should be accepted as an undisputable fact.

CRIMINAL LAW §46.4 Counsel -- Duties [STRICKLAND[

LEdHN[12]

In representing a criminal defendant, counsel owes a duty of loyalty, a duty to avoid conflicts of interest, a duty to advocate the defendant's cause, a duty to consult with the defendant on important decisions, a duty to keep defendant informed of important developements in the course of the prosecution, and a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.

As seen at HN12: Criminal Process, Assistance of Counsel: The duty to investigate derives from counsel's basic function, which is to make the adversarial testing process work in the particular case.....

Counsel failed to investigate, counsel failed to keep defendant informed of important decisions being made. Case in point, counsel was given the names of seven potential witnesses. Counsel on his own and without investigating first, made the decision that there was nothing to be gained from having the witnesses present at trial. Counsel did however pretend that witnesses would be called for the defense. This is appearant from examining appendice H . A news paper article which quoted counsel's own words at the end of the first day of trial. Leaving the defendant ignorant to the fact that he had no witnesses on his behalf until early morning on day two, at the beginning of the defenses case being put on. Appendice, I clearly shows that there were no witnesses for the defense on November 10, 2015 other than the defendant.

This was a violation of the defendant's 6th amendment right to compell the presence of witnesses on his behalf. Counsel chooses now to claim there were no witness requested by the defendant that were not presented. This assertion defies logic and reality.

The Sixth Amendment to the U.S. Constitution guarantees the right to the effective assistance of counsel. Strickland v. Washington 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L. Ed. 2d 674 (1984). A defendant is entitled to a new trial if he can show (1) that trial counsel's performance was defective; and (2) a reasonable probability that, but for the deficient performance, the outcome of the proceeding would have been different. A Petitioner can meet this standard by showing that counsel failed to conduct adequate pretrial investigation. Jones v. Wood, 114 F.3d 1002 (9th Cir. 1977). " Before an attorney can make a reasonable strategic choice against pursuing a certain line of investigation, the attorney must obtain the facts needed to make the decision."

Counsel in the present case did not in any manner follow-up the request by the petitioner to secure the potential witnesse. Turner, Franklin or Mutts. Instead, in counsel's sworn affidavit filed in response to the trial court writ which claimed ineffective assistance for failing to call witnesses to trial he stated: " I do not know what witnesses Mr. Mosley requested that were not presented. There are no witnesses that I can recall that would have given testimony benificial to Mr. Mosley's defense".

Counsel reached this conclusion without the required investigation needed to make a reasonable strategic choice against pursuing a certain line of defense. As cited above, indicating that counsel failed to provide the effective assistance of counsel as is envisioned and required by the Sixth Amendment.

This requirement of counsel is also supported by:

The Standards of Practice for Indigent Defense Counsel ("Standards") which are mandated by 19.2-163.01 (A)(4). Under Standard 4.1 concerning investigations (Sec. A) it states: Counsel has a duty to conduct an independent investigation regardless of the accused's admissions or account of events provided to counsel.

The Sixth Amendment right to the effective assistance of counsel providing for due process of law under the Counsel Clause in part states:...to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Ramonez v. Berghuis, 490 F.3d 482 (CA 6 2007)...p. 489. In sum the point is this: constitutionally effective counsel "must" develope trial strategy in the true sense - not what bears a false label of strategy - based on what investigation reveals witnesses will actually testify to, not based on what counsel guesses they might say in the absence of a full investigation..... Writ Granted.

In the present case based on counsel's statement in his sworn affidavit which states:"I do not know what witnesses Mr. Mosley requested that were not presented... There are no witnesses that I can recall that would have given testimony benificial to Mr. Mosley's defense." (This statement by counsel is exactly what was deemed inappropriate in Ramonez cited above. In the present case counsel simply guessed what the witnesses might say. There is no other way to conclude that.." There are no witnesses that I can recall that would have given testimony benificial to Mr. Mosley's defense." since he never interviewed them.

The district court in the present case in error argued that counsel did present to the jury the medical records from the Rehab Center and there-fore eliminated the need for the therapist as it would only have resulted in cumulative testimony or evidence. What counsel did enter into evidence was, (appendice M) a simple billing statement. This was a statement that I, (the petitioner had received from the veterans administration showing the dates of my appointments and , the amount that was to be paid for the day. This bill was also brought into the court by the petitioner and not by counsel. It was forced into counsel's hand upon realizing that there was no way to verify that the petitioner was even in treatment as he claimed. This billing statement did not shed any light on the actual condition of the petitioner. Exhib. F. Trial R. at 1090.

Upon examining appendice G-1, G-2 G-3 G-4 ___, ___. it becomes clear that a significant amount of information was related to counsel regarding each potential witness.

The Standards of Practice for Indigent Defense Counsel ("Standards") which are mandated by 19.2-163.01 (A)(4). Under Standard 4.1 concerning investigations (Sec. A) it states: Counsel has a duty to conduct an independent investigation regardless of the accused's admissions or account of events provided to counsel.

Also supported by the Sixth Amendment right to the effective assistance of counsel providing for due process of law under the Counsel Clause in part states...to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The District Court is now placing the unjust burden on the petitioner to reach out from prison to persons whose whereabouts are unknown, to obtain affidavits from said person in order to enjoy any similance of a witness on his behalf. This will never provide the same affect as having the same witness in front of the jury in a full question and answer session. It is believed that a reviewing court will not get the same affect from a brief and possibly not so well written statement from a potential witness.

This requirement will never suffice for the protection envisioned by the Sixth Amendment,

It would be difficult to believe that counsel presented all the witnesses that were requested of him considering that the record indicates that there were no defense witnesses.

Also counsel falsely represented that he is not aware of any witnesses that were not presented. Please note:

(a) Counsel did draw up a subpoena for The Rehab Associates of Central Virginia for records and the custodian there of.

A subpoena which appears to have not been served.

(b) On the same list of potential witnesses submitted to counsel was, Mutts, Franklin and, Turner, the three first responders as well, even though a subpoena was also drawn up for the three first responders.

The records from the Rehab Associates of Central Virginia were very essential in supporting the testimony of the petitiiner when he testified that he was trying to exit the apartment but was not able to use his right arm to unlock the doors dead bolt and safety locks.

Seen in Richards v. Quarterman, 556 F 3d 553 (CA 5 2009) p. 570 the District Court...concluded that [attorney] Davis was ineffective for not submitting Richards Veteran Administration medical records into evidence. Those records would have established Richchards ailments, about which he testified at trial and which included frequent chest pains treated with nitroglycerin and an inability to walk more than an half block without stopping. In addition, the records would have shown that Richards had triple by-pass surgery in June 2000, which left him with a left-sided weakness.

In light of any credible explanation for this failure, we agree with the District Court that the state court's conclusion to the contrary was an unreasonable application of Strickland, and that its contrary factual findings were rebutted by clear and convincing evidence.

Is there sufficient reason to believe that: Trial counsel was ineffective given the cumulative effect of his failure to perform prior to trial, at trial and post conviction?

The claim of cumulative ineffectiveness was not specifically presented to the state court, however there were approximately twelve individual claims made against counsel in the state court.

The argument for cumulative errors on counsel is first found on pages 56-62 in the petition to the federal court as Ground #8.

The test for determining whether counsel's assistance was ineffective has been established by Strickland v. Washington, 466 U.S. 668, 667-88, 691-92 (1984). and Smith v. Brown, 291 Va. 260 267, 781 S.E. 2d 744, 749 (2016); i.e., the test is whether counsel's performance were deficient, and/or fell below an objective standard of reasonableness, and whether petitioner was prejudiced as a result. Id.

Blackburn v. Foltz, 828 F.2d 1177 (CA 6 1987) p 1184, although we have addressed errors individually for discussion purposes, it is important to note the we have considered them within the context of counsel's overall performance and in view of all the facts in the record. See Kimmelman, 106 S.Ct. at 2589 [.] Having thus concluded that [counsel] Girards' performance was deficient under the Strickland guidelines, we turn to the prejudice component of the Strickland test.

p 1186. We cannot escape the conclusion that counsel's errors, in combination, effectively deprived Blackburn of a meaningful defense. [...] Due to the combined errors of counsel, Blackburn was unable to subject the prosecutions case to "the crucible of meaningful adversarial testing.

Martin v. Rose, 744 F.2d 1245, 1250 (6th Cir. 1984) Parle v. Runnels, 505 F.3d 922 (CA 9 2007) p. 927. The Supreme Court has clearly established that the combined effect of multiple trial court errors violate due process where it renders the resulting criminal trial fundamentally unfair.....

In the present case the petitioner has alleged that counsel failed to perform in the following areas:

1. counsel failed to object to arguments, instructions and other incidents of trial refering to first degree murder to the jury by the prosecutor when, the warrant charging the petitioner and,that counsel had told petitioner that he would be tried for second degree murder.
2. Counsel failed to call witnesses to testify on behalf of the petitioner although he had been given seven potential witnesses to investigate.
3. Counsel failed to hire a private investigator after being requested to do so, because there was a crucial piece of evidence that the petitioner was sure to be benificial to his defense. (retrieving a third bullet from the wall of Apt.
4. Counsel failed to request SDT for telephone records of the victim as well as the petitioner which would have completely contradicted the time line established by the states star witness.

5. Counsel failed to obtain the victim's criminal record which contained offense(s) considered violent. Counsel claimed the prosecutor did not make it available in the open file practice which was used. The prosecutor in turn claimed that the record was made available to counsel but counsel failed to obtain it for use in the trial. Counsel in post conviction motion made a Brady claim against the state. The prosecutor's story was believed over counsel's claim of Brady violation. The multiple drug convictions were also relevent to the case.

6. Counsel failed to introduce evidence available to him that would have shown that the victim was not found covered by a blanket, which is what the prosecution did represent to the jury.

7. Counsel failed to introduce letters which had been written by the states star witness which showed beyond a doubt that Mr. Davis had explicitly asked for a deal in exchange for his testimony. One letter in my case and, a second letter in an attempt to get the same deal for a second case. The second letter was labled "Bonus Case" in the heading.

   Counsel in post conviction motion argued that it was the court's interference with his cross examination of the key witness that prevented him from introducing the letter to the jury or court as defense exhibit. Counsel did amit that he did not complete his cross examination of Mr. Davis.

8. Counsel failed to make jury aware that much evidence from the crime scene was withheld from the lab for testing and therefore there was nothing to present at trial on behalf of the defense. Withheld were; drugs (cocaine), marijuana and a pill. Also the ten dollar bill used to ingest the cocaine.

9. Counsel failed to object during closing arguments as the prosecutor began to recount the testimony of the petitioner to the jury. In doing so, the actual testimony of the petitioner was changed to present a very fantastical story that was unbelievable to everyone including the petitioner himself.

[RELATIVE TO QUESTION...3.]

3. Part of the petitioner's reason for filing a pro se motion to Set Aside The Verdict and Sentencing For A New Trial was; to have the court to look at the alleged misconduct of the prosecutor and the police. To see how their conduct may have brought about the conviction at trial. Trial counsel aside from his lack of preparation for the trial, (neglectiong to call witnesses or to have available evidence brought to trial) also felt that there was nothin inappropriate about the conduct of the prosecutor or the police investigation. Therefore when counsel file his motion for a new trial he did not include the two distinct claims in his motion. So this does distinguish the nature of defense motion and that filed by the petitioner.

The trial court dismissed the pro se motion without hearing the merits of the claims made therein. Instead the cout ruled that it was dismissing the pro se motion for the same reasons set forth in dismissing the counsel's motion. The court stated that the two motions piggybacked one another. That was an erred conclusion and that is made clear by the fact that the record does not show any argument on behalf of counsel in regards to the conduct of the prosecutor or the police investigation.

The erred conclusion that the two motions were the same as was announced by the trial court is also the reason that there was no way to raise these issues on direct appeal.Not being a part of the record for use on appeal.

When the issues were again put before the trial court in a petition for writ of habeas, the court denied the claims citing Slayton v. Parrigan, 215 Va. 27...This was an error again on the part of the trial court because it was the trial court itself that created the problem of not creating a record for use in the direct appeal process.

Kimmelman v. Morrison raises the question of whether the issue come as a claim of ineffective assistance of counsel, then they are no longer free standing claims and as such may be reviewed by the federal court.

In petition for writ of habeas to the trial court Claim (14d) Ineffective Assistance of Appeal Counsel states: This claim is filed because counsel failed to communicate with the petitioner in response to petitioner's many request for input into the appeal. Counsel failed to respond and failed to keep petitioner informed as the case moved forward.

To fully understand what was being requested of counsel at this phase see appendice, K-1 , K-2 , K-3 , K-4 , _____.

These are the actual request that were being made to counsel. In advance of the motion hearing the petitioner was trying to provide counsel with information regarding the claims of prosecutorial misconduct and police misconduct. Counsel did not reply.

It was necessary to inform counsel of these issues because the two motions (one file by trial counsel who had removed himself after filing but before the hearing date) and the pro se motion, were filed in February of 2016 and new counsel come on the case in June of 2016. So it was necessary to communicate to him matters of concern. That did not happen.

[RELATIVE TO QUESTION...4.]

4. There has been no full and fair opportunity given to the petitioner to redress these issues with the state court, nor with the federal court because of the reliance on Slayton v. Parrigan.

This is a denial of the petitioner's First Amendment Right To Petition The Government for a Redress of Grievances.

The pro se motion containing the issues upon which the redress was based, was not allowed being presented. The trial court's relying on the belief that they "PiggyBacked" was not a sufficient basis for denying this petitioner's right to have the grievances heard. This claim of the court was in error.

The federal court for the Western District, in concurring with the trial court did in and of itself, deny the petitioner's right to petition the government for a redress of grievance.

Therefore it would be a proper Exception to the Exhaustion Requirement in this case since the petitioner has not been afforded a full and fair opportunity to address his grievances.

Seeking a remedy in a state court would be fruitless as there are no available or effective remedies to pursue in this matter.

TABLE OF AUTHORITIES CITED

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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:

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

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

The opinion of the United States court of appeals 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 United States district 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.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix C 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 U.S. Dist. Ct. Western Dist. of VA court appears at Appendix D to the petition and is

[ ] reported at 2022 U.S. Dist. LEXIS 197080; 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 _____.

[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 July 14, 2021. A copy of that decision appears at Appendix ___C___.

[ ] 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

5th AMENDMENT TO THE U.S. CONSTITUTION

6TH AMENDMENT TO THE U.S. CONSTITUTION

14TH AMENDMENT TO THE U.S. CONSTITUTION

STATE STATUTE: VA CODE § 19.2-163.01 (A)(4) /(Sec. A)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Larry D. Mosley

Date: 1-4-24