No. 24-5183

ORIGINAL

FILED
JUL 24 2024
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

HARSHADKUMAR NANJIBHAI JADAV — PETITIONER
(Your Name)

vs.

J. WOODSON, WARDEN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

HARSHADKUMAR NANJIBHAI JADAV, #1851236
(Your Name)

VADOC CMDC, 3521 WOODS WAY
(Address)

STATE FARM, VA 23160
(City, State, Zip Code)

(Phone Number)

QUESTIONS PRESENTED

1. What constitutes as 'new' evidence, and whether the state prisoner made a proper showing of actual innocence under Schlup?

2. Whether the Virginia state prisoner overcame AEDPA barrier and satisfied the merits of his claim that defense counsel provided ineffective assistance by failing to object to the prosecutor's use of a false 911 audio recording that was not even admitted into evidence at trial.

3. Whether the Fifth Amendment right to silence bears upon the defendant's lack of remorse; and
   whether defense counsel provided ineffective assistance by failing to object properly to a guilt-phase jury instruction making a conclusive presumption of "the defendant's lack of remorse".

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:

TABLE OF CONTENTS

INDEX TO APPENDICES

EXHIBITS

EXHIBIT 1 Order of Virginia Supreme Court Granting Motion to Amend

EXHIBIT 2 Motion to Amend Filed in Virginia Supreme Court

EXHIBIT 3 Petition for Appeal filed for Habeas Corpus in Virginia Supreme Court

EXHIBIT 4 Virginia Supreme Court Rule 5:7 (e)

EXHIBIT 5 Virginia Supreme Court Rule 1:8

EXHIBIT 6 Trial Transcript Day 1

EXHIBIT 7 Trial Transcript Day 2

EXHIBIT 8 Trial Transcript Day 3

EXHIBIT 9 Trial Transcript Day 4

EXHIBIT 10 Virginia Code §8.01-654 (A)1

EXHIBIT 11 Prosecutor's Affidavit

EXHIBIT 12 Late Mail Receipt

EXHIBIT 13 Respondent's mail in Virginia Supreme Court

EXHIBIT 14 28 USC §2254

TABLE OF AUTHORITIES CITED

STATUTES AND RULES

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 Dec. 8, 2023.

[ ] 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: May 7, 2024, and a copy of the order denying rehearing appears at Appendix C.

[ ] 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

1. 28 U.S.C. $2254

   Referenced in Appendix B at 10-11

   See, attached Exhibit 14

2. Virginia Code §19.2-327.10-16

   Referenced in Appendix F

   This statutes allows petition for actual innocence in Virginia

3. Virginia Code §8.01-654

   This statutes governs petition for habeas corpus in Virginia

   See, attached Exhibit 10

   Referenced on page 27 in this petition.

4. Virginia Supreme Court Rule 5:7

   See, attached Exhibit 4

   This rule govern the motion to amend a petition in Virginia.

   Referenced on page 27 in this petition.

5. Virginia Supreme Court Rule 1:8

   See, attached Exhibit 5

   This rule also governs amendments to petition in Virginia.

   Referenced on page 28 in this petition.

STATEMENT OF THE CASE

Comes Now. Harshadkumar Nanjibhai Jadav("Jadav", "Petitioner" or "Defendant"), a Virginia State prisoner proceeding pro se, with his writ of certiorari, challenging his conviction in the Circuit Court of Hanover County, Virginia("trial court") for first-degree murder. All the claims raised in this petition rely entirely on the facts already established in the state courts. For a complete recitation of facts derived from the Court of Appeals of Virginia, please refer Appendix B at 1-5; Appendix D at 2-6; Appendix H at 5-10. Facts necessary for adjudication of the claims are listed as below, along with the procedural history of the claims.

1. Facts Related to the Actual Innocence Claim and the Video Evidence

Prosecutors at trial presented Mr. Buchanan's testimony to authenticate a clip of security video recording at his house. Trial Transcript("Tr.") Day 2, pg. 9; Exhibit 7 at 9. He provided police a video recorded between "2100 hours on 9/4 ans 0600 hours on 9/5" of 2016. Id. at 14. Defense counsel Mr. Jones claimed that he had never seen the full video, stating "I don't recall that I was ever given the full video of from nine o'clock to five o'clock. I don't know that I've seen that. May be they've given it to me and I've not reviewed it." Id. at 14-15.

Jones raised the question of video being exculpatory. Id. at 15-16. Prosecutor, Ms. Skipper, claimed that video was not exculpatory, and thus, not provided to the defense. Id. at 16-17.

Skipper explained, "what we actually provided was just the three clips that we plan to use in court and not the full ten hours of video. But the police did review the full ten hours of video and found nothing exculpatory." Id. at 16-17. Jones hypothesized that the video would be exculpatory if it showed unknown suspects around the time of the crime. Id. at 17-18. The trial judge agreed, "obviously it could be, and I would consider that exculpatory and I believe the Commonwealth would." Id. at 18. Skipper confirmed that the full video did show other cars "that went through at the relevant time." Id. at 18. The court found the video clips properly authenticated, and marked it for identification. Id. at 19. Skipper also confirmed that the entire video was in police possession. Id. at 21.The video, neither the clips nor the full ten hours, was ever admitted into evidence at trial. The clips disc was marked Exhibit 9, but not admitted.

More than three years after the trial, Skipper wrote an affidavit on Sept. 24, 2020, explaining the video and other such evidence. Exhibit 11. Skipper wrote, "Commonwealth provided Jadav's attorney, Vaughn Jones, with open-file discovery." Exhibit 11 at 2. She claimed, the video "showed the street upon which a car would likely travel to exit the neighborhood." Id. at 3. Regarding the Brady disclosure, Skipper explained, "the Commonwealth case-file contained a disc of the portions of the surveillance video" that was not identical to the "video in possession of the police." Id. at 2.

2. Facts Related to the 911 Audio Recording Claim

At trial, the prosecutors presented witness Charles Udriet, the Deputy Director of the Hanover County 911 center. Trial Tr. Day 1, at 312; Exhibit 6. He is the custodian of records for the recorded 911 calls. Id. at 313. The prosecutors admitted into evidence an audio recording of 911 call made by Jadav on the morning of Sept. 05, 2016. Id. at 313-14. The audio was marked Commonwealth's exhibit 8 at trial. Id.

During closing arguments, the prosecutor Skipper claimed, "in that 911 call at five minutes and 33 seconds into the call the defendant said she's dead. At five minutes and 42 seconds into the call, he said she's definitely dead." Trial Tr. Day 4 at 14; Exhibit 7 at 14. The prosecutors played an audio clip, multiple times, claiming that it was from Jadav's 911 call. Id. at 14-15. The defense counsel did not object.

During state direct appeal proceedings. the Court of Appeals of Virginia made a factual finding of the evidence addeced at trial. Appendix D at 2-6; Appendix B at 1-5. Regarding the 911 call audio, the state court found:

> When appellant called 911, however, he did not state that she was clearly dead. Instead, he described her as "all bloodied up." ... Rather than telling the operator that Reena was dead, appellant responded that she was too heavy and "all jammed up." When the 911 operator asked appellant if Reena was "beyond help," appellant replied. "I'm not a fucking doctor. I don't know." Appendix D at 3-4.

3. Facts Related to the Jury Instruction IAC claim

At the end of the third day of the trial, the court and the counsels discussed a non-model jury instruction on 'premeditation', an essential element of the first-degree murder charge in Virginia. Trial Tr. Day 3 at 223-29. The instruction reads:

> In deciding whether premeditation and deliberation exist, you may consider the brutality of the attack, whether more than one blow was struck, the disparity in size between the defendant and the victim, the concealment of the victim's body, the defendant's lack of remorse and the defendant's efforts to avoid detection. Appendix B at 21.

The defense counsel objected on the ground that the instruction no. 11 'singled out the factors for emphasis'. Trial Tr. Day 3 at 223-29. The trial court overruled the objection. The counsel did not object on the two grounds, (a) the Fifth Amendment defendant's right to silence, and (b) the Sixth Amendment government's burden of proof beyond a reasonable doubt.

--Procedural history of the claim

On July 24, 2020, Jadav, proceeding pro se, filed a Writ of Actual Innocence under Virginia Code §19.2-327.10-16 in the Virginia Court of Appeals. See, Appendix F. The state court refused to consider the surveillance video a 'new' evidence. The court also did not find the affidavit, standalone, material. The Virginia Supreme Court denied the petition for appeal on Sept. 23, 2022. Appendix G.

Parallel to the Actual Innocence proceeding, on July 30, 2020, proceeding pro se, Jadav filed a state habeas petition in the Circuit Court of Hanover County attacking the validity of his conviction. Jadav raised two relevant claims regarding the video as follows:

I. The prosecution suppressed exculpatory, material video evidence and thus violated due process under Brady.

II. Trial counsel was ineffective for the failure to investigate develope, and produce at trial the exculpatory video evidence. See, Appendix B at 7.

On Oct. 06, 2020, the respondent filed a motion to dismiss, along with the prosecutor's affidavit as an exhibit in the trial court. The Virginia DOC received this legal mail on the same day(!), but delivered it to Jadav on Oct. 19, 2020. Exhibit 12. Jadav immediately mailed his response on the very next day on Oct. 20, 2020. But, the trial court dismissed the petition on Oct. 27, 2020 without considering the response. Appendix D at1.

Jadav then filed a petition for appeal in the Virginia Supreme Court. See, Exhibit 3. Both these claims were raised in this petition as error 1 and error 2. Jadav also raised an error 13 for the late mail delivery issue. Id. at 24-25. on Jan. 27, 2021, the respondent notified the court that they did not wish to file a response, and instead relied on the motion to dismiss filed in the trial court. Exhibit 13.

Around this time, Jadav became aware of the contradiction between the 911 audio recording admitted into evidence and the prosecutor's use of an audio recording during closing arguments at trial. On, Feb. 23, 2021, Jadav raised two more claims by filing a motion to amend in the Virginia Supreme Court. Exhibit 2. The claims are as follows:

Claim 13: The petitioner claims that prosecutor at trial presented false evidence and participated in deliberate deception of the court and the jury, and thus violated Due Process. The prosecutors also violated Brady obligation by failing to disclose impeachment evidence.

Claim 14: The petitioner claims that his trial counsel failed to investigate 911 audio, and failed to impeach police and the prosecutors.

The Virginia Supreme Court granted the motion on Apr. 09, 2021. Again, on Apr. 22, 2021, Jadav raised one more claim through a second motion to amend in the highest state court, but the state court denied the second motion on May 13, 2021. Finally, on Nov. 11, 2021, the court refused the petition. Appendix E.

Jadav, proceeding pro se, sought review by the Supreme Court of the United States("SCOTUS"), and the review was denied. 142 S. Ct. 1450, 212 L.Ed.2d 543(2022).

--Federal Petition

On Feb. 03, 2022, Jadav, proceeding pro se, timely filed his petition of habeas corpus pursuant to 28 U.S.C. §2254. See, Appendix B at 9 for the list of claims raised in that petition. State habeas claim I was raised as federal habeas claim 1(B) regarding the Brady violation on the video. State habeas claim II was raised as federal habeas claim 2(C) regarding the IAC claim on the video. Jadav also asked the court to apply Schlup's actual innocence exception for any procedurally defaulted claims. Id. at 13.

The District court denied the Brady claim 1(B) as procedurally defaulted. Id. at 14-15. The lower court denied the IAC claim 2(C) entirely on §2254(d) grounds. Id. at 29-30. The lower court denied the Schlup's actual innocence claim stating, "Jadav has presented no new evidence to establish his claim of actual innocence." Id. at 13.

Regarding the 911 audio claims raised in the Virginia Supreme Court, Jadav raised due process claim 13 as federal habeas claim 1(A). The IAC claim 14 was raised as federal habeas claim 2(G). Id. at 9. The district court failed to find these two claims as exhausted, and declared them procedurally defaulted. Id. at 10-11. The district court agreed with the respondent's assertion that these "claims were not raised during the prior state

proceedings and have not been presented to the highest state court." Id. at 11. The claim 2(G), state habeas claim 14, was denied under the Martinez exception, as not 'substantial'. Id. at 18.

Regarding the jury instruction IAC claim, it was raised only under the Martinez exception for the first time in the federal habeas petition in the district court. See, claim 2(H) on Appemdix B at 18. The district court applied Strickland test and dismissed the claim stating, "counsel was not ineffective under either prong of Strickland for not objecting to the instruction." Id. at 18-23.

The district court denied the certificate of appealability ("CoA") on any of the claims. Appendix B. Jadav's petition for appeal for a CoA in the Fourth Circuit was also denied. Appendix A. The Fourth circuit also denied the petition for rehearing and rehearing en banc. Appendix C.

REASONS FOR GRANTING THE PETITION

I. What constitutes as 'new' evidence and whether the state prisoner made a proper showing of actual innocence under Schlup.

A. Standard of Review

To prevent a "fundamental miscarriage of Justice", a petitioner is not barred when he makes a "credible showing of actual innocence", which provides a gateway to federal review of the petitioner's otherwise procedurally barred claim of constitutional violation. Mcquiggin v. Perkins, 569 US 383, 392, 133 S.Ct. 1924, 185 L.Ed.2d 1019(2013). This "exception is grounded in the 'equitable discretion' of habeas courts to see that deferal constitutional errors do not result in the incarceration of innocent persons", and it survived AEDPA's passage. Id. at 292-93. To satisfy this standard, first, "a petitioner must present new, reliable evidence" and second, "show by preponderance of the evidence 'that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.'" Schlup v. Delo, 513 US 298, 324, 327, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). Stated differently, that it is "more likely than not any reasonable juror would have reasonable doubt." House v. Bell, 547 US 518, 538, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006).

As a part of the reliability assessment of the first step, the Court "may consider how the timing of the petitioner's submission and the likely credibility of the witnesses bear on the probable reliability of that evidence", as well as the circumstances surrounding the evidence. Id. at 537, 551.

In evaluating the second step, whether it is more likely than not no reasonable juror would convict the petitioner, the court "must consider all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial." House, 547 US at 538. In weighing the evidence, "the court's function is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors"; actual innocence standard "does not require absolute certainty about the petitioner's guilt or innocence." Id.

B. Argument

There is a circuit split on the issue of what constitutes as 'new' evidence. As described below, some circuits allow only 'newly discovered' evidence, while others allow 'newly presented' evidence as well. The Fourth circuit has not ruled on the issue yet. Instant case presents both these kinds of new evidence. Thus, the petitioner would have his claim reviewed in all the circuits that have ruled on the issue. Without any guidance, the district court stated, "Jadav has presented no new evidence to establish his claim of actual innocence." Appendix B at 13. The lower courts never reached the second step of the claim. In the following, Jadav describes the circuit split, new evidence in the instant case, and how total evidence satisfies Schlup standard.

1. Circuit Split

There is a circuit split about whether the 'new' evidence required under Schlup includes only newly discovered evidence that was not available at the time of trial, or broadly includes all evidence that was not presented to the fact-finder during the trial, i.e. newly presented evidence. See, Reeves v. Fayette SCI, 897 F.3d 154, 161(3rd Cir. 2018)(describing the circuit split). The Seventh and Ninth Circuits have interpreted this phrase to mean evidence is 'new' for purposes of a Schlup analysis so long as it was 'not presented' at trial. Kidd v. Norman, 651 F.3d 947, 952(8th cir. 2011)(citing Gomez v. Jaimet, 350 F.3d 673, 679-80(7th cir. 2003), and Griffin v. Johnson, 350 F.3d 956, 962-63(9th cir. 2003)). The Second and Sixth circuits also agree with this 'newly presented' view. See, Rivas v. Fischer, 897 F.3d 514, 543(2nd cir. 2012)(defining "new evidence" as an evidence not heard by the jury); Souter v. Jones, 395 F.3d 577, 595 n.9(6th cir. 2005).

On the other hand, the Third and Eighth circuits have held "that evidence is 'new' only if it was not available at the time of trial through the exercise of due diligence." Kidd, 651 F.3d at 952(citing Hubbard v. Pinchak, 378 F.3d 333, 341(3rd cir. 2004). While nominally declining to weigh in, the Fifth circuit also appears to endorse this "newly discovered" view. See, Hancock v. Davis, 906 F.3d 387, 389-90(5th cir. 2018).

The Fourth circuit has not ruled on the issue yet.

--IAC Exception

The Third circuit has held that when a petitioner asserts ineffective assistance of counsel("IAC") based on counsel's failure to discover or present to the fact-finder the very exculpatory evidence that demonstrates his actual innocence, such evidence constitutes 'new' evidence for purposes of the Schlup actual innocence gateway. See, Reeves, 897 F.3d at 162-64. Those circuits that define "new" evidence to include evidence not presented at trial find support in Schlup. The Schlup Court stated that a federal habeas court, after being presented with new, reliable evidence, must then weigh "all of the evidence. including... evidence tenably claimed to have been wrongly excluded or to have become available only after the trial"to determine whether no reasonable juror would have found the petitioner guilty. Schlup, 513 US at 327-28. The reference to "wrongly excluded" evidence suggests that the assessment of an actual innocence claim is not intended to be strickly limited to newly discovered evidence- at least not in the context of reaching an ineffective assistance of counsel claim based on counsel's failure to investigate or present at trial such an exculpatory evidence, as was the case in Schlup.

Indeed, among the new evidence presented by the petitioner in Schlup was an affidavit containing witness statements that were available at trial. See, Id. at 310, n.21, but the Supreme Court did not discuss the signifincance of the evidence's availability nor reject the evidence outright.

In articulating the new, reliable evidence requirement, the Supreme Court stated that the petitioner must support his allegation of constitutional error with new reliable evidence- whether it be exculpatory scientific evidence, trustworthy eyewitness account, or critical physical evidence- that was not presented at trial. Id. at 324. Even if the Court decides newly discovered view is correct, limited IAC exception avoids an inequity that could lead to the incarceration of innocent individual. Such an inequity could occur under the following circumstances: say that a petitioner was convicted of a murder, and the prosecutor had withheld a video recording depicting unknown suspects. The petitioner could invoke actual innocence gateway to pursue his Brady due process claim because the evidence was newly discovered.

Now, assume that the same video recording was available to trial counsel at trial, but counsel did not present it to the jury. Under newly discovered view, that petitioner would be forced to concede that the evidence is not new. This petitioner would not be allowed to prove his innocence using the same video.

The limited IAC exception to newly discovered view thus (i) ensures that reliable, compelling evidence of innocence will not be rejucted on the basis that it should have been discovered or presented by counsel where the very constitutional violation asserted is that counsel failed to take appropriate actions with respect to that specific evidence; and (ii) is consistent with the Supreme Court's command that a petitioner will pass through the actual innocence gateway in rare and extraordinary cases.

2. Instant Case: New Evidence

a. Surveillance Video

Commonwealth presented Mr. Buchanan's testimony to properly authenticate a security video recording at his house. Trial Tr. Day 2, pg. 9. He provided police a video recorded "between 2100 hours on 9/4 and 0600 hours on 9/5" of 2016. Id. at 14. Defense counsel, Jones, claimed: "I don't recall that I was ever given the full video of from nine o'clock to five o'clock. I don't know that I've seen that. May be they've given it to me and I've not reviewed it." Id. at 14-16. Prosecutor, Skipper, clarified to the court why the full video was not provided to the defense. Id. at 16-17.

Skipper: "There's nothing exculpatory on the full videotape which has been reviewed by the police department, and if there was, the Commonwealth certainly would have provided it to the defense attorney. What we did provide access to was just the clips we intend to show in court because that's what we're required to do under the rules of discovery...what we actually provided was just the three clips that we plan to use in court and not the full ten hours of video. But the police did review the full video and found nothing exculpatory."

Jones hypothesized that the full video could be exculpatory if it showed unknown suspects around the time of crime. Id. at 17-18. The trial judge immediately declared: "Obviously it could be, and I would consider that exculpatory and I believe the Commonwealth would." Id. at 18.

Skipper then confirmed to the court that the full video did show other cars that went through at the relevant time. Id. at 18. Thus, the prosecutor implicitely confirmed exculpatory value of the full video. The judge declared the video admissible. and authenticated, as well as marked for identification. Id. at 19-20. Skipper promised that they would admit the video via some other witness. Id. But, the video was never admitted into evidence at trial; neither by Skipper, nor by Jones.

If the Court finds that the video was suppressed under Brady violation, then it would be 'newly discovered' evidence for Schlup. If the Court finds the video was not suppressed, then the defense counsel certainly failed to investigate the video and also failed to present it into evidence at trial. Then, the video would be 'newly presented' evidence. Either way, it would satisfy Schlup standard's first requirement of 'new' evidence. Also, the video is already deemed authenticated and admissible by the state court. Thus, it is inherently 'reliable'. Thus, this full surveillance video would allow a reviewing court to proceed to the next step of Schlup analysis. The district court's emphatic declaration that "Jadav has presented no new evidence" is thus contrary to the precedents of this Court, as well as the Second, Third, Sixth, Seventh, Ninth, and Tenth circuits. The lower courts have failed to properly apply Schlup standard to the facts of the case.

b. Prosecutor's Affidavit

Jadav's conviction took place in 2017. This affidavit of the prosecutor, Skipper, was written on Sept. 24, 2020. Exhibit 11. Thus, it is 'newly discovered' evidence under this court's clear precedent. Every circuit allows the Schlup analysis to move to the second step in light of the newly discovered evidence. Despite that, the lower court's claim that "Jadav has presented no new evidence" is untenable.

In assessing the adequacy of the claim of actual innocence, "the habeas court must consider 'all the evidence', old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under 'rules of admissibility that would govern at trial,'" Schlup, 513 US at 327-28, House, 547 US at 538 The innocence inquiry "requires a holistic judgment about 'all the evidence', and its likely effect on reasonable jurors applying the reasonable doubt standard." House, 547 US at 539.

3. Totality of the Evidence

a. Trial Record

Dr. Hays, who performed the autopsy, testified that the time of Reena's death remains uncertain. Trial Tr. Day 2, pg. 147. The prosecutors presented testimony of Mr. Hultgren and Dr. Stroble to establish the time of death. These witnesses testified that they heard a scream at 11 pm on Sept. 04, 2016, behind their home in the same neighborhood as Jadav residence. Trial Tr. Day 1, pg. 251-54, 257-63. When they looked outside, they did not see anyone, neither Reena, not anyone else.

In his audio recorded statement to police, Jadav told police that he went to bed at 10:30 pm on Sept. 04, 2016. Appendix B at 36. His cell records showed that it movedaway from the home area and went towards Ms. Mitchell's house more than a mile away, where a hammer was found(a few days later) along with a few clothes. Id. Trial record is silent on any indication as to who was in possession of the cell phone during the movement. The prosecution's theory presumes the possession of the cell phone as well as the presence at the crime scene at 11 pm.

The theory also assumes the possession of the hammer. There was no evidence to suggest that Jadav was ever in possession of the alleged murder weapon, hammer, at any point in his life. Tria Tr. Day 1, at 276. Dr. Hays also testified that he had never compared the hammer to Reena's wounds to determine whether it really was the murder weapon or not. Trial Tr. Day 2, pg. 137-38. He also testified that Reena's head had a 'puncture wound' that was not consistent with the hammer. Id.

Crime scene analyst and prosecutor's expert witness, Investigator Laplaga, testified that the attacker "would have blood splatter" on them. Laplaga also confirmed that Jadav did not have any blood splatter on him, his car, his home, or clothes Trial Tr. Day 2, pg. 214-17. Even assuming that the clothes found in Mitchell's yard belonged to Jadav, they did not have any blood on them either. Trial Tr. Day 2, pg. 86-87.

Investigator Cary testified that he had seen some videos(not in evidence) from stores along the speculated path of cell phone.

See, Trial Tr. Day 3, pg. 70-71. When defense counsel asked him if he could identify in those videos, the person or the cell phone devide, and Cary testified "no". Id. In fact, the cell phone DNA test results showed that it contained Reena's DNA on it. Trial Tr. Day 3, pg. 277-79. Also, clothes found near the hammer, a few days after the crime and a few miles away from the crime scene, contained three different DNAs on it; Reena's, Jadav's and an unknown person's DNA.

b. Old and New Evidence And Schlup Standard

Trial court gave Jury Instruction 4 that requires, "When Commonwealth relies upon circumstantial evidence, the circumstance proved must be consistent with guilt and inconsistent with innocence." Appendix B at 19. The instruction further requires that, "it is not sufficient that the circumstances proved create a suspicion of guilt, however strong, or even a probability of guilt. The evidence as a whole must exclude every reasonable theory of innicence." Id.

The Court of Appeals of Virginia's ruling on Jadav's claim of sufficiency of evidence sums the evidence as follows:

> From the cell phone records, the jury could reasonably conclude that [Jadav] lied to police when he told them he had not left the house all night, and he did so to conceal his guilt...The timeline of [Jadav]'s movements on the night of the murder provided further proof that he was the perpetrator. A woman's scream was heard at 11:00 pm near the

crime scene, and [Jadav]'s phone left the neighborhood at 11:31 pm, providing him with sufficient time to change his clothesand clean up after the murder before driving to Mitchell's house to dispose of the murder weapon and soiled clothes." Appendix B at 36.

The lower courts assumes Jadav's presence at the crime scene as well as the time of crime being 11 pm. The trial record fails to exclude a reasonable hypothesis of innocence that Jadav did not have any blood splatter on him. The court assumes that Jadav 'cleaned up' his 'soiled' clothes. There is simply no evidence to prove that the clothes were his, or that they were soiled, or that Jadav cleaned them up. Well, the whole movement of the cell phone is attributed to Jadav based on a speculation that he had the possession of the phone at night. This is contrary to the evidence that the phone had Reena's DNA on it, not Jadav's. The prosection's evidence failed to exclude the reasonable hypothesis that Reena was alive at 11:30 pm and was travelling with the phone, not Jadav.

The lower courts claimed that "jury could rationally infer that he took the hammer with him when he walked with Reena through their subdivision, and when they reached an area that was no illuminated, he brutally attacked her at 11:00 pm. His phone records showed that he did not leave the neighborhood until 11:31 pm, providing him with theopportunity to clean himself up and changed his clothes before driving to Mitchell's house to dispose of the murder weapon and his original clothes." Id. at 38.

According to the lower court, having an opportunity to commit a crime is the same as evidence of the act of crime. But, the presence of unknown suspects around the crime scene at the relevant time is exculpatory under Virginia law. See, Burton v. Commonwealth, 122 Va. 847, 94 S.E. 923(1918)("when two persons had the same opportunity to commit the offense and upon the whole evidence in the case there remains a reasonable doubt as to which of the two committed it, neither of the two can be convicted.")

Here, lack of any evidence pointing to Jadav's presence at the crime scene, or time of death, or possession of the alleged murder weapon are all highly suggestive of the speculative nature of the guilt. On top of that, presence of an unknown person's DNA on the clothes found near the hammer suggest that the crime could have been committed by this unknown person. Under Virginia law, neither Jadav nor this unknown person can be convicted due to the circumstantial evidence. Prosecution's evidence failed to exclude this reasonable hypothesis of innocence under Jury instruction 4. That is why the trial judge declared the presence of unknown suspects in the full video to be exculpatory. See, Commonwealth v. Smith, 259 Va. 780(2000)(proof of opportunity to commit a crime is not sufficient to establish guilt. The evidence must exclude every reasonable opportunity by others to have committed it.)Since the video renders the total evidence insufficient to convict, which is a higher standard of proof than Schlup standard, the exculpatory video is material under Schlup implicitely. Any resonable juror would have reasonable doubt in this case.

4. Constitutional Rights Violation

Here, Jadav raised two claims under Brady and Strickland, in order to support his claim of actual innocence. See, federal habeas claims 1(B) and 2(C) which are state habeas claims I and II respectively. Appendix B at 7-9. Thsurveillance video is material under Schlup standard, and thus implicitely satisfies prejudice prong of Strickland and Brady standards. The video is also exculpatory as described above. The only question remains, was the video suppressed under Brady or was the counsel's performance deficient.?

a. Brady Suppression

This court has held, "if a prosecutor asserts that he complies with Brady through an open file policy, defense counsel may reasonably rely on that file to contain all materials state is constitutionally obligated to disclose under Brady." Banks v. Dretke, 540 US 668, 696, 124 S.Ct. 1256, 157 L.Ed.2d 1166(2004) (citing, Strickler v. Greene, 527 US 263, 283, 119 S.Ct. 1936, 144 L.Ed.2d 286(1999)).When police or prosecutors conceal a significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent upon the State to set the record straight. Banks, 540 US, at 675-76.

As described in the newly discovered affidavit, the full surveillance video was not present in the prosecutor's open file. Exhibit 11 at 1-3. The open file contained only a clip of 2-3 minutes video and not the full 9 hours of video. Thus, under the Strickler and Banks rule, the full video was suppressed.

II. Whether the Virginia prisoner overcame AEDPA barrier and satisfied the merits of his claim that defense counsel provided ineffective assistance by failing to object to prosecutor's use of a false 911 audio recording that was not even admitted into the evidence at trial.

A. Standard of Review

Before bringing a federal habeas petition, a prisoner must first exhaust his claims in the appropriate state court. See, 28 U.S.C. §2254(b). Thus, a prisoner convicted in Virginia must have presented the same factual and legal claims raised in his §2254 petition to the Virginia Supreme Court. Appendix B at 10.

A determination on a factual issue made by a state court shall be presumed correct. Id. at 27(quoting §2254(e)(1)). In reviewing a federal habeas petition, federal courts must presume the correctness of a state court's factual determinations, unless the habeas petitioner rebuts the presumption of correctness by clear and convincing evidence. Id.

AEDPA erects a formidable barrier to federal relief for prisoners whose claims have been adjudicated on the merits in state court. Id. at 26. Section §2254(d) demands an inquiry into whether a prisoner's claim has been "adjudicated on the merits" in state court. Davis v. Ayala, 576 U.S. 257, 269, 135 S.Ct. 2187 192 L.Ed.2d 323(2015). When a federal claim was inadvertantly overlooked in state courts, §2254(d) entitles the prisoner to an unencumbered opportunity to make his case before a federal judge. Johnson v. Williams, 568 U.S. 289, 303, 133 S.Ct. 1088, 185 L.Ed. 2d. 105(2013).

To establish ineffective assistance, a petitioner must show that counsel's performance fell below an objective standard of reasonableness and that he was prejudiced by the alleged deficient performance. Strickland v. Washington, 466 U.S. 668, 669, 104 S.Ct. 2052, 80 L.Ed.2d 674(1984). Strickland's first prong, the "performance" inquiry require a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Id. at 687. Strickland's second prong, the "prejudice" inquiry, requires a showing that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A resonable probability is a "probability sufficient to undermine confidence in the outcome." Id.

B. Argument

As described in the statement of facts above, this claim was first raised to the Virginia Supreme Court through a motion to amend, which was granted by the highest state court, during the state habeas proceedings. See, Exhibits 1 and 2. Thus, this state habeas claim 14, now a federal habeas claim 2(G), is properly exhausted and not procedurally defaulted under AEDPA doctrine. But, the district court erroneously agreed with the respondent's misrepresentation that the claim 2(G) was "not raised during prior state proceedings and have not been presented to the highest state court." Appendix B at 11. The district court found the claim 'exhausted and procedurally defaulted'. Id.

The first question in front of this court is, whether the petitioner satisfied AEDPA's exhaustion requirement and overcame procedural default. If the Court decides that the petitioner has properly raised his claim in the highest state court, federal courts below then failed to properly adjudicate the claim.

If the Court decides that the claim was procedurally defaulted, then also the federal court should review it under Martinez exception, because the claim does not require any new evidence and can be adjudicated entirely on the evidence in state record.

i. Exhaustion and Procedural Default

In Virginia, a petition for habeas corpus can be filed in either the trial court or the Virginia Supreme Court. Exhibit 10. After the petition for a habeas corpus is properly filed, Va. Sup. Ct. Rule 5:7(e) allows the petitioner to amend the petition. See, Exhibit 4.

--Va. Sup. Ct. Rule 5:7(e)

If the statute of limitation has not expired, a petitioner may move - at any time before a ruling is rendered on the merits of the petition as initially filed - for leave of this court to substitute an amended petition. This amendment can include additional claims not presented in the petition as initially filed. Any such motion must attach a copy of the proposed amended petition.

Thus, there are only two constraints on the amendment, (a) the statute of limitaion and (b) leave by court. In the instant case, the petitioner satisfied both this constraints.

Also, under Virginia Supreme Court Rule 1:8, if the motion is granted, the amended pleading accompanying the motion will be deemed filed. See, Exhibit 5. Thus, there is no doubt that the claim was properly presented and filed in the highest state court.

The district court's erroneous ruling that the claim was not raised during prior state proceedings is contrary to the state record. See, Appendix B at 11. This Court should remand the case back to the lower federal court for the proper adjudication of the claim.

ii. Adjudication on the Merits

AEDPA's §2254(d) demands an inquiry into whether a state prisoner's claim was "adjudicated on the merits" in state courts. Davis, 576 US at 269. After declaring the claim procedurally defaulted, the district court never conducted this inquiry. The petitioner claims that the state courts failed to adjudicate the claim on the merits.

A judgment is said to have been rendered "on the merits" only if it was "delivered after the court... heard and evaluated the evidence and the parties' substantive arguments." Johnson, 568 US at 302. After granting the motion, the Virginia Supreme Court never asked the respondent to file any response to the claim. The respondent in turn did not make any counter argument in this claim either. Thus, the Virginia Supreme Court's summary dismissal of the petition could not have been an "adjudication on the merits." See, Appendix E. A federal could should now review this claim de novo.

The court also made its intentions clear when it limited its review to the "judgment complained of". Id. Apparently, the highest state court reviewed only the claims appealed from the denial of the habeas petition in the trial court. i.e. first 12 claims only. This claim 2(G), state claim 14, was never adjudicated in the state courts. This clear language in summary dismissal is evidence that the claim was not adjudicated on the merits during state proceedings. A de novo review is required.

iii. Merits

a. Deficient Performance

A "counsel has a duty to make reasonable investigation." Strickland, 466 US at 691. This duty to investigate derives from counsel's basic function to make the adversarial process work in the particular case. Kimmelman v. Morrison, 477 US 365, 384(1986). An effective counsel preserves claims to be considered on appeal. Martinez v. Ryan, 566 US 1, 182 L.Ed.2d 272, 285(2012).

Prosecutors at first presented into evidence an audio recorded statement to police as CW Exhibit 7. After that, they admitted into evidence the audio recording of the petitioner's 911 call as CW Exhibit 8. Neither of the audios were played yet. During the closing arguments, the prosecutors played clips of both these audios. Trial Tr. Day 4, pg. 14-16. Not exactly! They altered the audio of 911 call with a fake audio when they played it to the jury. This fake audio is also an outside evidence, and was never admitted into evidence.

In the real 911 audio admitted into evidence, as the Court of Appeals of Virginia found, Jadav said "I don't know" when the 911 operator asked him if his wife(Reena) was dead. The police arrived at the scene after the 911 call. They audio recorded Jadav's statement while handcuffed right at the scene. In this recording, when police informed Jadav that his wife was dead, Jadav is heard saying, "you're kidding me, right?" Thus, there is a consistent theme in both audio recording that Jadav was not aware of his wife's death till police informed him after the 911 call.

Prosecution's circamstantial case had no evidence to put Jadav at the crime scene at 11 pm on the night. Their theory was dependant on proving the consciousness of guilt. In order to do that, the prosecutors tried to show that Jadav lied to police in his statement. But how can they do that, since there was no inconsistency between his statement and the 911 call? The corrupt prosecutors utilized a fake audio that did contradict with the 911 audio. The fake audio had a voice saying, "She is dead. She is definitely dead." Trial Tr. Day 4 at 14-16. They played this fake audio along with the police statement "you're kidding me", over and over in order to show that Jadav was lying to police and "feining surprise" of his wife's death. They rpoved consciousness of guilt with this deception. The defense counsel Jones did not object. This failure to object is based on his failure to first investigate the evidence. This cannot be called objectively reasonable under Strickland.

b. Prejudice

it is improper for a prosecutor to even insinuate an existence of outside record, because it would violate priviledge of cross-examination. Donnelly v. DeChristoforo, 416 US 637, 646, 94 S.Ct. 1868, 40 L.Ed.2d 431(1974). Here, the prosecutors not only insinuated, but also presented an outside evidence. The defense counsel failed to object or clarify the facts to the jury. This failure to object is based on his failure to investigate the state evidence. Jones failed to protect Jadav's substantial right of cross examination.

"Consistent and repeated misrepresentation" of a dramatic exhibit in evidence may profoundly impress a jury and may have a significant impact on the jury's deliberations. Donnelly, 416 US at 646. The prosecutors repeatedly played this fake audio along with Jadav's statement to police, with a deliberate effort to destroy Jadav's credibility. Jones failed to stop the prosecutors from claiming that Jadav was "feigning surprise" to police. The prosecutors were allowed to falsely claim to the jury that it showed Jadav's consciousness of guilt.

A proper inference the jury can make from disbelieved testiminy is that the opposite of the testimony is true. United States v. Mejia, 82 F.3d 1032, 1038(11th cir. 1996). Jadav had maintained his innocence at trial. By deceptively using this false 911 audio, the prosecutors were able to claim that Jadav is guilty because he lied to police. From then on, Jadav lost his presumption of innocence in front of the jury.

Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture. Strickland, 466 US at 695. State's evidence against Jadav was circumstantial and weak. There was no evidence to show that Jadav was even present at the crime scene at 11 pm. The murder weapon had the victim's DNA, but nothing from Jadav. The state had confessed that crime scene investigator LaPlaga failed to report luminol test results in his police reports because they were not in state's favor. Clothes found near the hammer had three distinct DNA profiles, showing that there is an unknown person involved in this case. State had no evidence to show why Jadav had no "blood splatter" on him, despite their own expert witness testimony stating that the "attacker would have blood splatter on him". Perhaps that is why the prosecutors resorted to corrupt means and deliberately played a false audio in front of the jury in order to gain a conviction.

The defense counsel Jones had a duty to participate in the adversarial testing process at trial. His silence allowed the jury to improperly derive Jadav's consciousness of guilt from the false evidence. He also failed to impeach the prosecution for violating Jadav's constitutional rights. He failed to object and ask for a mistrial, which would be likely at this juncture. Jones failed to question the thoroughness and even the good faith of the entire prosecution. Had Jones objected, there is a reasonable probability that the result of the proceeding would have been different. We cannot have confidence in the outcome anymore.

III. Whether the Fifth Amendment Right to Silence bears upon the defendant's lack of remorse; and

whether defense counsel provided ineffective assistance by failing to object properly to a guilt-phase jury instruction making a conclusive presumption of "the defendant's lack of remorse".

A. Standard of Review

A federal court may review a defaulted claim, if the petitioner can demonstrate cause for default and prejudice as a result of the alleged violation of federal law. Appendix B at 11. In Martinez, this Court established a narrow exception to the "cause and prejudice" test for a "substantial claim" of ineffective assistance of counsel claims. Martinez v. Ryan, 566 US 1, 132 S. Ct. 1309, 182 L.Ed.2d 272(2012). To establish ineffective assistance, a petitioner must show that counsel's performance fell below an objective standard of reasonableness and that he was prejudiced by the alleged deficient performance. Strickland v. Washington, 466 US 668, 669, 104 S.Ct. 2052, 80 L.Ed.2d 674(1984). To show prejudice, petitioner must show there is a reasonable probability that, but for counsel's unprofessional error, the ourcome of the proceeding would have been different. Id. at 694.

To invoke Martinez, a petitioner must demonstrate that the state counsel was ineffective or absent, and the underlying IAC claim is substantial. Porter v. Zook, 898 F.3d 408, 438(4th cir. 2018). Virginia clearly fell under the Martinez exception. Fowler v. Joyner, 753 F.3d 446, 462(4th cir. 2014).

B. Argument

Towards the end of the guilt-phase of the trial, court discussed the jury instructions. Trial Tr. Day 3 223-29. Trial prosecutor offered a non-model instruction as follows:

"In deciding whether premeditation and deliberation exist, you may consider the brutality of the attack, whether more than one blow was struck, the disparity in size between the defendant and the victim, the concealment of the victim's body, the defendant's lack of remorse and the defendant's efforts to avoid detection." Trial Tr. Day 4 at 5-11; Appendix B at 18-22.

Defense counsel Jones objected that the instruction 'singled out factors for emphasis'. Id. The court overruled the objection.

i. Deficient Performance

Jones did not object on the ground that the instruction was in violation of the defendant's Fifth Amendment right to silence by allowing the jury to find an essential element of premeditation from the defendant's lack of remorse. Jones also did not object on the ground that the instruction relieved the government of it's burden of proof beyond a reasonable doubt on the element of premeditation.

(a) The Fifth Amendment and Lack of Remorse

Remorse implies guilt. Exercising one's Fifth Amendment right to silence therefore entails failure to speak words of remorse. Accordingly, penalizing a defendant for failure to speak and articulate remorse burdens his Fifth Amendment privilege against self-incrimination. The Fifth Amendment forbids "either

comment by the prosecution on the accused's silence or instruction by the court that such silence is evidence of guilt." Griffin v. California, 380 US 609, 615, 14 L.Ed.2d 106, 85 S.Ct. 1229(1965). Thus, this jury instruction no. 11 given by the trial court, see, Trial Tr. Day 4 at 5-11, is in violation of the clear precedent of this court.

The district court inexplicably failed to adjudicate this part of Jadav's argument completely. The respondent has also failed to argue this point in any of their filings. Here, the defense counsel's failure to timely object on such an important ground renders his performance deficient under Strickland. Lack of remorse is a character evidence, and is considered at the penalty phase as an aggravating factor. But to allow the jury to consider the defendant's lack of remorse, his failure to speak words of remorse, in order to find an essential element of guilt, clearly violates the Fifth Amendment. The defense counsel's failure to participate in an adversarial testing process resulted in the defendant's constitutional right's violation. He wants to object, but he did not know what is the right objection. His performance was deficient under Strickland.

(b) The Sixth Amendment Burden of Proof

Any fact...that increases the maximum penalty for a crime must be ...submitted to a jury, and proven beyond a reasonable doubt. Apprendi v. New Jersey, 530 US 466, 476, 120 S.Ct. 2348, 147 L.Ed.2d 435(2000). Such facts are considered "elements" of the offense...and proof of them must satisfy the requirements of

the Sixth Amendment. Id. at 478. The Sixth Amendment not only committs any issue of fact that constitutes an element of the offense to a jury, it also requires that the fact be proved beyond a reasonable doubt, and the defendant must, in the process, enjoy the presumption of innocence. Id.at 484. Consistent with this Sixth Amendment protections, the process cannot "presume the existence of a fact that must be proved to the jury by the government." Sandstrom v. Montana, 442 US 510, 521-23, 99 S.Ct. 2450, 61 L.Ed.2d 39(1979). Such a presumption...would conflict with "the overriding presumption of innocence which the law endows the accused and which extends to every element of the crime. Id. at 552. To presume, infer, or deem a fact admitted because the defendant has remained silent, however, is contrary to the Sixth Amendment. Id. at 521-24.

A proper reading of the instruction no. 11 shows that a jury would interprete the instruction as if certain facts are a given, that they have already been proven and accepted by the court, i.e the defendant's lack of remorse, the brutality of the attack, the defendant's efforts to avoid detection etc.

Apparently, the instruction does not allow the jury to determine for themselves, whether or not the defendant showed any remorse, whether or not the attack was brutal, whether or not the defendant made efforts to avoid detection, etc. the jury was irrefutably relieved from its burden of finding out these facts for themselves. The court forced the jury to accept these facts as already proven.

The district court claimed that the jury "would not have presumed" these facts, that the jury "was able to infer" these facts. Appendix B at 22. This decision is contrary to "the almost invariable assumption of the law that jurors follow their instructions." Richardson v. Marsh, 481 US 200, 206, 107 S.Ct. 1702, 95 L.Ed.2d 176(1987). Under the Sandstrom ruling, the jury is not allowed to presume or infer a fact admitted in violation of the right to remain silent. By allowing the jury to consider the defendant's lack of remorse, in order to find an essential element of the crime, i.e. premeditation, thus violates both the Fifth and the Sixth Amendments.

ii. Prejudice

Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture. Strickland, 466 US at 695. The counsel's failure to object properly deprived the defendant of his 'substantial' rights under the Fifth and the Sixth Amendments. The jury was allowed to find the essential element of premeditation from his exercise of right to silence. Also, the government was relieved of its burden of proof beyonf a reasonable doubt on this element.

In Virginia, the jury could not have found the defendant guilty of first-degree murder without proving premeditation. The defendant would have been found guilty of a lesser crime, second degree only. Thus, the defense counsel's failure to object properly increased the maximum penalty, thus resulting in prejudice.

The jury instruction created the impression in the jury's mind that the defendant lacked remorse. Thus, the jury was left with an understanding that the defendant is already guilty, since remorse implies guilt. The instruction thus contradicts with the bedrock principal of our justice system that the accused is to be presumed innocent until proven guilty. This jury instruction took away from the defendant the only protection available at trial, his presumption of innocence. Thus, the verdict arrived by the jury is a result of an unfair trial. This is a significant claim. The lower court's decision to the contrary is untenable in our justice system that bestows upon every accused the presumption of innocence at trial.

iii. Circuit Split

This Court has the question open "whether silence bears upon the determination of the lack of remorse." Mitchell v. United States, 526 US 314, 325, 119 S.Ct. 1307, 143 L.Ed.2d 424(1999). There is a circuit split on the issue. See, United States v. Caro 597 F.3d 608, 629(4th cir. 2010). This circuit split is regarding the use of right to silence in determining the defendant's lack of remorse at sentencing phase. None of these circuits allow a jury to even consider lack of remorse at guilt phase. Instant case highlights the issue, and this Court has an opportunity to resolve this question that has left the circuits divided for decades.

Summary

Questions raised in this petition highlight a decades long circuit divide on substantial constitutional issues such as right to silence, fabrication of evidence and actual innocence. This Court has the authority and duty to resolve these issues that affect not only Jadav, but also millions of citizens facing a state criminal trial. The issues raised here highlight extreme malfunction prevalant in today's state criminal justice system.

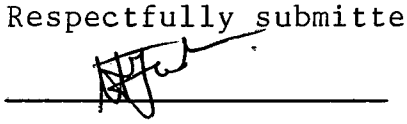
Jadav's proof of innocence became known in the midst of his trial when the judge declared the video to be exculpatory. Eight years later, Jadav is still trying to prove his innocence. On top of that, Jadav also presents evidence to clearly show that the state prosecutors deliberately used a fabricated evidence in order to gain a tainted conviction. If that was not enough, third issue highlights how state prosecutors are violating a criminal defendant's presumption of innocence and right to silence.

After diligently trying to prove his innocence, Jadav now comes to the court of last resort. In the name of justice, equity and comity, an innocent man pleads this Court to use it's discretionary power and resolve these constitutional questions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 07/17/2024

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