

24-5270 ORIGINAL

FILED

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

Patrick Douglas Johnson — PETITIONER  
(Your Name)

vs.

The State of Texas — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

TEXAS COURT OF CRIMINAL APPEALS

**PETITION FOR WRIT OF CERTIORARI**

Patrick Douglas Johnson

(Your Name)

810 FM 2821, West Hwy. 75, N.

(Address)

Huntsville, Texas, 77349-0005

(City, State, Zip Code)

(936) 295-9126

(Phone Number)

## QUESTION(S) PRESENTED

QUESTION No. 1: Whether the use of selective evidence is an impermissible divide and conquer strategy for evaluating the sufficiency of the evidence under the 14TH Amendment to the United States Constitution when such evaluation is upon record evidence as a whole?

QUESTION No. 2: Whether a State appellate court as a matter of Due Process under the 14TH Amendment to the United States Constitution is required to declare witness testimony incredible as a matter of law when the witness has testified to something or an event that could not have occurred and which would rendered the identification of the Defendant unreliable?

QUESTION No. 3: Whether a State appellate court as a matter of Due Process under the 14TH Amendment to the United States Constitution is required to preform an evaluation of the likelihood of misidentification during its review of a challenge to the sufficiency of the evidence when identification is a fact issue?

QUESTION No. 4: Whether the standard of review announced in *Jackson v. Virginia*, 99 S.Ct. 2781 (1979) is an ambiguous and unconstitutional standard of review in evaluating challenges to the sufficiency of the evidence because (1) it fails to define what sufficient evidence is, and (2) favors the prosecution by allowing the reviewing court to infer what the jury considered or could have considered in reaching a verdict?

QUESTION No. 5: Is a State criminal defendant deprived of his constitutional rights to Due Process under the 14TH Amendment to the United States Constitution when the State appellate court employs a standard of review regarding challenges to the sufficiency of the evidence that is contrary to the standard of review announced in *Jackson v. Virginia*, 99 S.Ct. 2781 (1979)?

## LIST OF PARTIES

[ ] 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: Petitioner's Appellate Counsel, Christi Dean, Assistant Public Defender, Dallas County, 133 N. Riverfront Blvd., LB-2, Dallas, Texas, 75207-4313; State's Appellate Counsel, Grace Shin, Assistant District Attorney, Dallas County, 133 N. Riverfront Blvd., LB-19, Dallas, Texas, 75207-4399; State Prosecuting Attorney, Stacy M. Soule, P.O. Box 13046, Austin, Texas, 78711-3046

## RELATED CASES

1. Partick Douglas Johnson v. The State of Texas, Case No. #05-22-00294-CR, Fifth Court of Appeals for The State of Texas.
2. In re Patrick Douglas Johnson, Case No. #PD-0268-24, Texas Court of Criminal Appeals.

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APPENDIX B : Unpublished Written Decision of the Fifth Court of Appeals for The State of Texas delivered on March 11, 2024, in Case No. #05-22-00294-CR, Styled: Patrick Douglas Johnson v. The State of Texas, affirming the Judgment & Sentence.

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### OTHER

IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

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 A 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 Fifth Court of Appeals court appears at Appendix B to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

## JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was \_\_\_\_\_.

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\_\_\_\_\_.  
S

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 May 15, 2024. A copy of that decision appears at Appendix A.

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\_\_\_\_\_.  
2

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, 14TH Amendment, Section 1; All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Title 28 U.S.C, Section 2254(d) An application for a writ of habeas corpus on behalf of a person in custody to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

## STATEMENT OF THE CASE

Petitioner was charged with the alleged offense of Capital Murder under Section 19.03(a)(7)(A) of the Texas Penal Code. The indictment recited that the Petitioner unlawfully, intentionally, and knowingly caused the death of Robbi Hodge by shooting her with a firearm, a deadly weapon, and during the same criminal transaction intentionally and knowingly caused the death of Michale Hodge by shooting him with a firearm, a deadly weapon. (Appendix B).

Section 19.03(a)(7)(A) of the Texas Penal Code provides that a person commits capital murder if he intentionally or knowingly causes the death of more than one person during the same criminal transaction. The Texas Court of Criminal Appeals has interpreted this phrase "same criminal transaction" to mean a continuous and uninterrupted chain of conduct occurring over a very short period of time in a rapid sequence of unbroken events. The Application Paragraph of the Jury Charge required the State to prove the commission of two murders during the same criminal transaction. (CR.Vol.I; pp. 477-478).

Upon a plea of not guilty before a jury, on March 31, 2022, Petitioner was convicted for the alleged offense of Capital Murder, and under the provisions of Article 37.071, Section 1(a) of the Texas Code of Criminal Procedure was sentenced Life in the Texas Department of Criminal Justice-Correctional Institutions Division without the possibility of parole. (CR.Vol.I; p. 473).

Before the court of appeals, Petitioner argued that: (1) The evidence was legally insufficient to support the verdict because

the State fail to prove that Petitioner intentionally or knowingly cause the deaths of more than one person, and (2) The evidence was legally insufficient to support the verdict because the State failed to prove that Petitioner caused the death of more than one person in the same criminal transaction. The court of appeals addressed the issues together.

The court of appeals held that the Petitioner's argument relied on testimony and evidence that conflicted with evidence that sufficiently supported the jury's verdict and on witness testimony the jury assessed for credibility. The court of appeals held that the Petitioner's argument from selected evidence was an impermissible "divide and conquer" argument, and that the reviewing court is not permitted to use a "divide and conquer" strategy for evaluating sufficiency of the evidence, which fails to consider the cumulative force of all the evidence. The court of appeals held that the jury heard testimony that Robbi<sup>□</sup> and Michale were killed in the same criminal transaction. (Appendix B).

The record reflects that State's witnesses David James, Charlie Ribron, and Millie Madison testified to hearing gunshots around 8:00 p.m. on December 19, 2018. However, none of the three (3) witness could testify that the 8:00 p.m. gunshots came from the residence of the Petitioner and RobbieHodge. Witnesses Charlie Ribron and Millie Madson heard gunshots at 3:00 a.m. on December 20, 2018, whom were both certain of the time because they tied it to their respective activities. Millie Madison, testified that she was certain of the timeing and the location of the gunshots because she was exiting her restroom and saw muzzle fire at the

residence of the Petitioner and Robbi Hodge through the sheer curtains in her bedroom. (RR.Vol.7; pp. 97-96).

State's witness Frank Serra, testified that he "believed" Robbi and Michale were killed during the same criminal transaction on the evening of December 19, 2018, and did not believe they were ~~they~~were shot at 3:00 a.m. on December 20, 2018, because Robbi was wearing daytime attire and jewelry when her body was found.

State's witness Stephen Lenfest, testified that he conducted the Autopsy on Michale Hodge's body, and that when the bodies were discovered, Michale's body was in full rigor. (RR.Vol.6; p. 66). Although not noted in the court of appeals opinion, the body of Robbi Hodge's body was in partial rigor. Lenfest, testified that the state of Michale's body was more consistent with the 3:00 a.m. shooting and time of death.

The court of appeals recited the standard of review to be used when gauging the sufficiency of the evidence to support a conviction. Citing, Jackson v. Virginia, 99 S.Ct. 2781 (1979), that when conducting a legal sufficiency analysis, the court of appeals views all of the evidence in the light most favorable to the verdict and determines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The court of appeals, however, held that it ~~measures~~the sufficiency of the evidence by the elements of the offense as defined in a hypothetically correct jury charge.

The court of appeals based on the purported review of the record, concluded that the jury could rationally have decided

beyone a reasonable doubt that Petitioner engaged in a continuous and uninterrupted process, over a short period of time, of carrying out the murder of more than one person.

Deduction of The Evidence: the court of appeals further held that eyewitness testimony placed the Petitioner at Robbi's home at the time gunshots emanated from Robbi's home on December 19. Petitioner was seen exiting Robbi's garage seconds after the shots and immediately fleeing in Robbi's vehicle. (Appendix B). The court of appeals did not elaborate on exactly what this eyewitness testimony consisted of.

The record on the other hand presents a uncertain and speculative identification of the Petitioner. Petitioner was not definitively identified, and the court of appeals substituted and unreasonable inference on the testimony of the State's witness David James, whom first testified that he saw Petitioner leave the house in Robbi's Dodge Nitro immediately after he heard the gunshots at 8:00 p.m. (RR.Vol.5; pp. 113, 146-151, 158). Specifically, James testified that he did not remember December 19th very well. (RR.Vol.5; p. 145). It was James's testimony, that on his way back from taking rollers to his mother's neighborhood hairdresser, he heard three to five gunshots 35-45 yards in front of him.

Caveat: There were 15 shall casings recovered from the scene, and the State's expert witness, a Crime Scene Analyst Jordan Bratcher, testified that he would expect anyone listening to have heard more than five shots if 15 were fired. (RR.Vol.5; p. 287).

James testified, that after he heard the gunshots, he started

walking toward the driveway of the Hodge house and before he reached it, the garage door opened. The prosecutor asked, "Who is standing or coming out of the garage?" James responded, "Okay. It was Pat, Patrick." (RR.Vol.5; p. 149). James could not, however, recall, what the Petitioner was wearing, and testified that the Petitioner was the "only person he knew that stayed there." The prosecutor then asked James to describe the Petitioner as he appeared in the garage, and James testified that he couldn't see no eyes, no teeth, no face, it was just a dark showdow. (RR.Vol.5; [p. 155]). James further diminished his observation and identification of the Petitioner, when he testified to the fact, that all he heard was the gunshots, and saw the vehicle leave the address. (RR.Vol.5; p. 158-159).

Petitioner sought review of the decision delivered by the court of appeal with the Texas Court of Criminal Appeals, via Petition for Discretionary Review.

Before the Court of Criminal Appeals, Petitioner questioned whether (1) the court of appeals' disposition of his claim that the evidence was legally insufficient to support the verdict because the State failed to prove, that Petitioner intentionally or knowingly caused the deaths of more than one person was in conflict with an applicable decisions of that court; (2) the court of appeals' disposition of his claim that the evidence was legally insufficient to support the verdict because the State failed to prove, that Petitioner intentionally or knowingly caused the deaths of more than one person during the same criminal transaction was in conflict with applicable decisions of that

court; (3) the court of appeals' analysis of his claim that the evidence was insufficient to support a conviction for Capital Murder is constitutionally adequate when the court of appeals should have declared testimony incredible as a matter of law when it was so unbelievable on its face that it defied physical law in light of all the evidence presented to the jury or the record as a whole; and (4) court of appeals properly determined that the evidence was sufficient to establish that the Petitioner caused the death of two (2) individuals in the same criminal transaction when evidence not considered by the court of appeals provided an objective view that the two (2) individuals were not killed during the same criminal transaction to support a conviction for Capital Murder.

Petitioner argued before the Court of Criminal Appeals, that this was solely a circumstantial case, and that the court of appeals should have determined whether the necessary inferences made by the jury were reasonably based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict, and that the evidence in this case was so weak that it only created a suspicion that a fact existed, that rendered the evidence as a whole insufficient to support the conviction. If anything, there was merely a modicum of evidence supportive of the elements of the offense charged.

Petitioner, further argued that the testimony of David James should have been declared incredible as a matter of law, because given his conflicting testimony and observation as eyewitness testimony, he physically could not have observed the event under

the laws of nature. The testimony of James did not lead directly to the Petitioner as having committed the murders. Further, the testimony of Frank Serra, that he believed Robbi and Michale were killed during the same criminal transaction, was based on his "belief;" a statement shy of being ascertain of a factual matter, a mere hunch, speculative in nature and fact.

Petitioner furthered, that the fact there were two (2) separate gunshots hours apart, there was a reasonable deduction that both of the alleged victims were not shot and killed at the same time, and the court of appeals did not account for inferences to be deducted from this predicative fact.

The Court of Criminal Appeals denied review without explanation that calls into question whether the Petitioner's claims were respective upon a thorough review.

## REASONS FOR GRANTING THE PETITION

Petitioner argues that this Court should grant review upon Rule 10(b) of the Supreme Court Rules because a State court has decided an important federal question in a way that conflicts with the decision of a United States Court of Appeals; and pursuant Rule 10(c) of the Supreme Court Rules because a State court has decided an important question of federal law that has not been, but should be settled by this Court, and has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Petitioner understands that review is rarely granted upon the assertion that the given error consists of erroneous factual findings or the misapplication of a properly stated rule of law, however, Petitioner argues that in the promotion of the fair administration of justice such errors call for the exercise of this Court's supervisory power to prevent a fundamental miscarriage of justice and incarceration of a person who is actually innocent.

In *Jackson v. Virginia*, 99 S.Ct. 2781 (1979), this Court held that in a challenge brought under Title 28 U.S.C., Section 2254, if the settled procedural prerequisites for such a claim has been otherwise satisfied, the habeas corpus petitioner is entitled to federal habeas relief, if it found that upon the "record evidence" adduced at the trial, no rational trier of fact could have found proof of guilt beyond a reasonable doubt.

This constitutional benchmark by which sufficiency of the evidence claims are analyzed are established under Jackson, even on federal habeas corpus review, however, on federal habeas corpus

review the criminal defendant is exposed to a threshold requirement for relief under Title 28 U.S.C., Section 2254(d)(1) and (2), that is not required on direct review, to the extent this Court is required to apply that standard of review to a challenge to the sufficiency of the evidence regardless of whether the claim comes before this Court directly after review by the State court, via Writ of Certiorari, or by habeas corpus.

It is clear that Jackson is a substantive rule of decision, which requires that to comport with the constitutional right to Due Process as implicated by the 14TH Amendment to the United States Constitution, a conviction must be supported by sufficient evidence. However, the Jackson Court did not define what "sufficient evidence" is, although the Jackson Court phrased it as that, "No person shall be made to suffer the onus of a criminal conviction except upon sufficient proof defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." This rule is general in nature and directs the inquiring court to ask a simple question, "whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

There should be no discern that the rhetoric of viewing the evidence in the light most favorable to the prosecution is a decisive phrase of and to benefit the prosecution, as it requires the reviewing court to side with the prosecution upon an unconstitutional motive by inferring what the jury considered or did not consider in reaching it's verdict...

The matter is that many States apply their own standard, developed in their case law, rather than directly applying Supreme Court precedent, or the constitutional standard or review, that would make any State's own standard of review outside the standard of review imposed by the Jackson Court. Clearly on federal habeas corpus review, this would be an unreasonable application of clearly established federal law as determined by this Court, or is contrary to clearly established federal law as determined by this Court. See., Title 28 U.S.C., Section 2254(d)(1) and (2).

The standard of review used by the appellate courts for the State of Texas is not as protective of the Petitioner's rights under the Jackson decision that was delivered in the context of a federal habeas proceeding, and not upon direct review of the case.

For instance the Jackson decision did not endorse a reviewing court to assume or for that matter presume that the jury inferred on the elements of the offense to support the conviction, when the proof left a element of the crime entirely to conjecture or summise.

For instance the Jackson decision did not endorse a reviewing court to measure the sufficiency of the evidence by the elements of the offense as defined in a hypothetically correct jury charge, that the Texas court's have defined as one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the

particular offense for which the defendant was tried. *Byrd v. State*, 3367S.W.3d 242, 246 (Tex.Cr.App. 2011). Either the Jury Charge is correct or incorrect.

Under Fifth Circuit precedent, an appellate court will not overturn a jury's verdict if a reasonable trier of fact conclude from the evidence that the elements of the offense were established beyond a reasonable doubt, viewing the evidence in the light most favorable to a verdict and drawing all reasonable inferences from the evidence to support a verdict. As an appellate court will not disturb a jury's verdict or weigh the credibility of witnesses. A conviction may be based on uncorroborated testimony of an accomplice or of someone making a plea bargain with the Government, provided that the testimony is not incredible or otherwise insubstantial on its face. Testimony will not be declared incredible as a matter of law unless it asserts facts that a witness physically could not have observed or event that could not have occurred under the laws of nature. *Guerra v. Johnson*, 90 F.3d 1075 (5th Cir. 1999), and *U.S. v. Castaneda*, 951 F.2d 44 (5th Cir. 1992).

A reviewing court faced with a record of historical facts that supports conflicting "inferences" must presume even if it does not affirmatively appear in the record that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution. *Cavazos v. Smith*, 132 S.Ct. 2 (2011).

The jury is the ultimate arbiter of credibility of a witness, and uncorroborated testimony of an accomplice is sufficient evidence on which to base a conviction. Only when testimony is so unbelievable

on its face that it defies physical law should the court intervene and declare it incredible as a matter of law. For example, an apple falling from a tree falls down, not up, and any witness who said the contrary would not be believable as a matter of law, not because his story is not credible. The witness is such a case would have testified to something that simply could not have happened. Whether odor in one's nose, but not dust in one's face could not happen was not established, and is not clear enough to be repudiated.

Petitioner argues that the fair identification requirement under the 14TH Amendment to the United States Constitution requires the evaluation of the likelihood of misidentification during the review of a challenge to the sufficiency of the evidence, when identification is a fact issue during the criminal defendant's trial.

This Court in *Neil v. Biggers*, 93 S.Ct. 375 (1972), deployed several facts affecting reliability of identification of the accused, that included (1) opportunity of the witness degree of attention, (2) accuracy of his prior description of the defendant, (3) level of certainty demonstrated at the time of confrontation, and (4) time between the crime and confrontation.

In this case, the physical evidence did not lead directly to the Petitioner having committed the murder of both Robbi [redacted] and Michale during the same criminal transaction as defined by State law, and the proof did not establish circumstances from which the jury could have "reasonably inferred" in light of common expiriences that the Petitioner intentionally or knowinly murdered

Robbi and Michale during the same criminal transaction as defined by State law, when the evidence is deducted from the review of the record as a whole.

For instant the court of appeals reliance of Detective Serra's testimony that he "believed" that Robbi and Michale were killed during same criminal transaction on the evening of December 19, 2018, was shy of being ascertain of a factual matter, a mere hunch, and clearly speculative in nature and fact, that a jury could not reasonably inferred that and found this belief to be true, and simply ignored the probative evidence that Robbi and Michale were not murdered during the same criminal transaction, when one body was in full rigor mortis and one body was in partial rigor mortis indicative of the fact, that both victims were shot at different times, which expert testimony provided that the state of Michale's body was more consistent with the 3:00 a.m. shooting and time of death. Further, this belief would have required the jury to speculate on whether Robbi and Michale were murdered at the same time...

For instant the court of appeals reliance on a factual matter that ~~an~~ eyewitness placed the Petitioner at the residence at the time gunshots emanated from the residence, was based on testimony that should have been declared incredible as a matter of law.

This is not a matter where the testimony of David James was contradictory in nature, but the fact that David James testified to something that reasonably and logically could not have been substantiated an objective conclusion that he identified the Petitioner when his identification of the Petitioner was diminishing.

The testimony of State's witness David James was never impeached by the defense, which may have been a tactical decision on part of the defense, because James identification of the Petitioner was unreliable on it's face, that no rationale trier of fact could inferred that it was the Petitioner based on his testimony.

It was the court of appeals decision to opt that the jury believed the testimony of James in view of direct proof that his testimony defied physical law and was unreliable on it's face.

The focus on this inquiry was not whether the jury believed what James said, nor would it seem to the court of appeals highly unlikely that James could have saw the Petitioner exiting the house via Garage. The question before the court of appeals was whether on the record before them, the witness testified to something that physical law says this could not have happen. The record before the court of appeals provides that the testimony provided by James was at best suspect and/or speculative. (RR.Vol.5; pp. 149-159).

Petitioner brought the fact that the court of appeals applied an erroneous and unconstitutional standard of review in reviewing his claim that the evidence was insufficient to support the jury's verdict because the record as a whole did not support such a finding. The Texas Court Criminal Appeals by denying the Petitioner's petition necessarily gave difference to the decision reached by the court of appeals in affirming the Judgment & Sentence of Conviction.

It is upon the reasons set out in Rule 10(b) and (c) of the

Supreme Court Rules that this Court should grant review, and most importantly to prevent a fundamentally miscarriage of justice, where in this case, the Petitioner's conviction for the better part is based pure speculation and unreliable testimony, that should have been declared incredible as a matter of law.

## **CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Patrick D. Johnson  
Patrick Douglas Johnson

Date: July 17, 2024