

No. _____

IN THE

Supreme Court of the United States

In re RODNEY YOUNG ANDERSON
Petitioner,

v.

LORIE DAVIS
Respondent.

On Petition For Writ Of Certiorari To The
District Court for the Southern District of Texas, Houston Division
[Cause No. 4:16-CV-00652]

PETITIONER FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The district court applied an incorrect standard of deferential review to the Texas court's unreasonable decision on the evidence adduced at the state writ of habeas corpus hearing instead of reviewing the record *de novo* and decide the merits of the federal writ of habeas corpus under 28 U.S.C. 2254(d)(1) and (e)(2).

The Texas Court of Criminal Appeals in a petition for discretionary review held that alleged drug evidence that was combined with rocks and dirt after Petitioner was arrested could be used to convict and sentence him for the full weight of that combination in violation of due process.

The Fifth Circuit Court of Appeals declined to hear an application for a certificate of appealability and dismissed Petitioner's appeal, even though Petitioner filed a timely notice of appeal within his application for certificate of appealability in the district court consistent with Fifth Circuit precedent. This court action, deemed by the Fifth Circuit to be an administrative action the Petitioner could not have anticipated, left the Petitioner without a review of his correct actions and denied him due process.

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TABLE OF CONTENTS

Question Presented.....	i
Parties To The Proceeding.....	ii
Table of Contents.....	1
Table of Cited Authorities.....	2
Petition For Writ of Certiorari.....	4
Citations To The Opinions.....	4
Grounds For Jurisdiction.....	5
Constitutional Provisions And Statutes Involved.....	6
Statement of The Case.....	7
Reasons For Granting The Writ.....	27
Conclusion.....	34
Final Judgment.....	App.1
Memorandum on Dismissal.....	App.2
Fifth Circuit Order Dismissing Appeal.....	App. 16
Fifth Circuit Mandate.....	App.19
Fifth Circuit Rejection of Rehearing.....	App. 20
Fifth Circuit Rejection of En Banc.....	App.21

Cases

, <i>Anderson v. Livingston</i> , Cause no. 4:16-CV-00652 (S.D. Tex. 2017).....	3
<i>Anderson v. Davis</i> , No. 17-20614 (5th Cir. Feb. 21, 2018)	3, 13
<i>Anderson v. Davis</i> , No. 17-20614 (5th Cir. Feb. 26, 2018)	3
<i>Anderson v. Davis</i> , No. 17-20614 (5th Cir. March 6, 2018).....	3
<i>Anderson v. State</i> , 416 S.W.3d 884, 889 (Tex. Crim. App. 2013)	4
<i>Clark v. AG</i> , 821 F.3d 1270, 1286 n.3 (11th Cir. 2016).....	14
<i>Clark v. AG</i> , 821 F.3d at 1286 n.3.....	15
<i>Cullen v. Pinholster</i> , 536 U.S. 170, 131 S. Ct. 1388, 1400-1401 &nn. 7,10, 179 L.Ed.2d 557 (2011).....	12
<i>Fields v. Thaler</i> , 588 F.3d 270, 279 (5th Cir. 2009).....	14
<i>Fields v. Thaler</i> , 588 F.3d at 279-80	15
<i>Foster v. Chatman</i> , 136 S. Ct. 1737, 195 L.Ed.2d 1, 25 (2016)[J. Alito, concurring] .	12
<i>Goldberg v. Kelly</i> , 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970)	16
<i>Lambert v. Blackwell</i> , 387 F.3d 210, 235 (3d Cir. 2004), <i>cert. denied</i> , 125 S.Ct. 2516 (2005)	11
<i>Stevens v. Heard</i> , 674 F.2d 320, 322 (5th Cir. 1982)	16
<i>Stevens v. Heard</i> , 674 F.2d 320, 322 (5th Cir. 1982)[notice of appeal within certificate of probable cause is proper]	13
<i>Taylor v. Maddox</i> , 366 F.3d 992, 999-1000 (9 th Cir. 2004), <i>cert denied</i> , 125 S. Ct. 809 (2004)	11
<i>Valdez v. Cockrell</i> , 274 F.3d 941, 951 n.17 (5th Cir. 2001)	10, 15
<i>Weaver v. Thompson</i> , 197 F.3d 359, 363 (9 th Cir. 1999).....	11
<i>Wood v. Allen</i> , 558 U.S. 290, 299, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010)	14
<i>Wood v. Allen</i> , 558 U.S. at 299 n.1	14

Statutes

§ 2254(d)(2)	10, 14, 15
§ 2254(e)(1)	10, 12, 14, 15
28 U.S.C. § 2254	10
28 U.S.C. § 2254(d) (2)and 28 U.S.C. § 2254(e)(1).....	14
28 U.S.C. § 2254(d)(2).....	14
28 U.S.C. § 2254(d)(2) & 28 U.S.C.....	12
28 U.S.C. § 2254(e)(1)	14
28 U.S.C. §1254 (1)	3
28 U.S.C. §2254	6, 13
28 USC § 2254	4
<i>Brady v. Maryland</i> , 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)	5
<i>In re Anderson</i> , 2014 Tex. Crim. App. Lexis 135 (Tex. Crim. App. 2014)	5
U.S.C. §2254 (d)(2) & (e)(1)	17

PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays that the writ of certiorari issue to review the opinion of the federal District Court for the Southern District of Texas and the Fifth Circuit Court of Appeals below.

CITATIONS TO THE OPINIONS AND ORDERS OF THE COURTS ENTERED IN THE CASE

The opinion of the District Court for the Southern District of Texas is unpublished, *Anderson v. Livingston*, Cause no. 4:16-CV-00652 (S.D. Tex. 2017), at page 1a of the appendix hereto. The decisions of the Fifth Circuit Court of Appeals are also unpublished and are contained at pages a16 through a20 *Anderson v. Davis*, No. 17-20614 (5th Cir. Feb. 21, 2018); *Anderson v. Davis*, No. 17-20614 (5th Cir. Feb. 26, 2018); *Anderson v. Davis*, No. 17-20614 (5th Cir. March 6, 2018).

BASIS FOR JURISDICTION

The Fifth Circuit dismissed Petitioner's appeal from the denial of his federal writ of habeas corpus upon a state court conviction on February 21, 2018. It declined his Motion for Rehearing on February 26, 2018 and his Motion for Rehearing *en banc* on March 6, 2018. This petition for a writ of certiorari is timely filed on May 22, 2018. This Court has jurisdiction of this petition under 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The United States Constitution, Fifth Amendment states in pertinent part:

No person shall ... be deprived of life, liberty, or property, without due process of law....

28 USC § 2254 states in pertinent part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgement 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-

...(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.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgement of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

Petitioner was convicted s of possession with intent to deliver a controlled substance and aggravated assault of a public servant in Texas district court. He appealed his conviction which was affirmed. *Anderson v. State*, 2011 Tex. App. Lexis 10038 (Tex. App. – Beaumont 2011). After his conviction was affirmed, he pursued a petition for discretionary review in the Texas Court of Criminal Appeals which was granted on the question of whether his conviction and sentence for drugs (including rocks and debris he never possessed) violated the due process clause because it was not competent evidence consistent with due process. Petition for Discretionary Review, page 48. Relying on a federal *Pinkerton v. United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946) (1946), analysis the Court of Criminal Appeals affirmed his conviction without deciding the due process component. *Anderson v. State*, 416 S.W.3d 884, 889 (Tex. Crim. App. 2013). The presentation of this claim to the Court of Criminal Appeals preserved it for subsequent review. Petitioner

sought a rehearing of the petition for discretionary review asking the State court to decide the issue, which was denied. *In re Anderson*, 2014 Tex. Crim. App. Lexis 135 (Tex. Crim. App. 2014).

Thereafter Petitioner raised this claim, and *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) claims in a State and then federal writ of habeas corpus. The Court of Criminal Appeals denied his state writ on December 9, 2015 “without written order on the findings of the trial court after hearing the application for writ of habeas corpus.” The trial court which heard the state writ issued unreasonable findings of fact and conclusions of law concerning Petitioner’s *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct.1194, 10 L.Ed.2d 215 (1963), claims. The opinion was not supported by the evidence adduced nor by a reasonable interpretation of applicable Supreme Court cases.

Rodney Young Anderson, Petitioner, was convicted under the law of parties in Texas of delivery of a controlled substance and aggravated assault of a peace officer. He was a passenger in a truck that his co-defendant drove to a shopping center where alleged methamphetamine was delivered to an informant and, when given the signal by the informant, undercover officers descended in force on the truck. Because the undercover officers would not be recognized as law enforcement, a marked police car was hidden behind the shopping center to make the stop of the truck. 6R126, ll 17-25; 127, ll1-10.¹ When the plain clothed officers approached the truck, the co-defendant reversed it from its parking place and, after he and Petitioner were shot, the truck struck the marked police

¹ This citation is to the volume number, R for Reporters Record, page number and line number in the trial court.

vehicle that had come from behind the shopping center to make the stop.² No officer was seriously injured in the accident. After the truck came to a stop and the Petitioner was arrested, removed to an ambulance, and transported to a hospital; law enforcement gathered the putative drug evidence. An officer collected these materials from the ground with a spoon. 8R 96, ll 8-18. Texas presented the rocks, debris, and alleged narcotics as the total weight of the drugs with which Petitioner was charged and sentenced even though Petitioner had never possessed nor intended to deliver the material. The State admitted that it was including the debris and rocks in the drugs alleged. 8R41, ll 9-17; 8R49, ll 7-17. Petitioner was sentenced to forty years for possession of the rocks, debris and narcotics and he was sentenced to life for the aggravated assault on a public servant as a party to the alleged drug transaction. CR 109- 116³. Texas punishes controlled substances offenses based on the weight of the substance including the post arrest added rocks and dirt.

Thereafter Petitioner raised this claim in a State and then federal writ of habeas corpus. The trial court which heard the state writ issued unreasonable findings of fact and conclusions of law that were not supported by the evidence adduced nor by a reasonable interpretation of applicable Supreme Court cases.

After the state writ, Petitioner raised his claims in a federal writ pursuant to 28 U.S.C. §2254, which provided the District Court jurisdiction of his writ. The District Court reviewed Petitioner's claims under a highly deferential standard.

² The co-defendant, fearing he was being robbed or attacked by unknow assailants, fled the parking lot while ducking the under-cover officers' gun fire. The Petitioner was immediately shot in the face and could see nothing that transpired.

³ The citation is to the clerk's record in the trial court followed by the page numbers.

The evidence adduced at the hearing, however, belies fact findings by the State court and that court reached conclusions of law that are an unreasonable application of Supreme Court precedent in light of those facts. At the State writ hearing, counsel put on evidence that the informant and key state's witness, Jeffrey Harmon ("Harmon"), had recanted his trial testimony. DX52 and 52a.⁴ Harmon admitted that Petitioner was not involved in the drug deal as he had represented at trial. Id. He stated that Petitioner did not possess narcotics and was not aware that the driver of the truck was going sell them. Id. Harmon said his trial testimony coerced by the State's threat of imprisonment. The State had also dismissed charges in exchange for Harmon's testimony. Id. Trial counsel testified at the hearing that they were unaware of the threats and promises made to Harmon or that his false testimony had been coerced. They were also unaware that he was recanting his testimony until writ counsel obtained him by subpoena and attachment.

Petitioner was also able to prove that the narcotics evidence at his trial was not the substance collected from the scene of his arrest. The substance collected by the evidence tech was six rocks⁵ of suspected narcotics, not the powdered narcotics entered into evidence at trial. 2WR88.⁶ The tech collected the only alleged narcotics evidence logged into evidence at the time of Petitioner's arrest. Upon testing at a State lab, the suspected drugs tested negative for narcotics. DX1. The powdered narcotics admitted at trial was not logged into evidence until over a month after Petitioner's arrest. DX45. Lieutenant Cash, supervisor of the Sheriff's Department testified that his division would never hold seized

⁴ Petitioners exhibits at the State writ hearing.

⁵ The suspected white rocks of alleged narcotics are not to be confused with the dirt and natural rocks later collected by other officers.

⁶ The citation is to the volume and page number of the State writ record.

narcotics evidence for a month before logging it into evidence. They had no facility to hold such evidence longer than an evening and at most over a weekend. 3WR153. Trial counsel testified that they were never made aware that six rocks of a non-narcotic substance were collected at the scene instead of the powdered narcotics admitted at trial.

Also, the narcotics evidence at trial increased in weight and changed in consistency between Petitioner's and his co-defendant's trials. DX51 & 3WR137. The State alleged that both Petitioner and his co-defendant had possessed the same exact two bags of powdered narcotics at Petitioner's trial, one being described as brown in color and the other described as tan in color. After Petitioner's trial, at his co-defendant's trial, a third bag of white, fluffy powdered narcotics was added into evidence without explanation. No police report, and none of the testimony at Petitioner's trial discussed "white, fluffy" powdered narcotics.

In addition, crucial to the defense of the aggravated assault charge was whether officers could be identified as law enforcement by the Petitioner or the public at the scene. Law enforcement claimed to have worn identifying badges and department insignia on their jackets and vests. Two eyewitnesses to Petitioner's arrest, Lindsey Paras and Corey Brummett, had made undisclosed written statements that the law enforcement officers involved in Petitioner's arrest were not identifiable as law enforcement officers by their clothing or any insignia. Instead, they were only given these witnesses' subsequent statements, which contained later descriptions of the officers after the shooting, and during the arrest and rescue of Petitioner, as now wearing obvious law enforcement clothing. Further, Lindsey Paras and Amy Vollart Pogue both testified they were

concerned by the rough appearance of the gun and baseball bat wielding men. One witness felt that her store was about to be robbed by one of them and later exclaimed to customers to look out because one of them had a gun. Chris Neal testified that he was unaware that the armed man who demanded his driver's license from him at the scene was a police officer, until the man pulled his badge out from beneath his shirt. 2WR193 & 195-196. The information that the men were not identifiable established the defense. Trial counsel testified that they were unaware of the initial statements of these eyewitnesses and that these statements would have likely caused a different result at trial.

Under these circumstances the federal court should have conducted a de novo review of the state court decision finding without support that this information was not new, was not favorable, and was not material. However, the federal district court applied a highly deferential standard of review to the State court's findings and conclusions and dismissed the writ. Petitioner challenged this deferential review in a motion for new trial and in his applications for certificates of appealability in the district court and Fifth Circuit Court of Appeals.

“Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary, §2254 (e)(1) and an adjudication on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable *in light of the evidence presented* in the state court proceeding.” *Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003)[emphasis added].

Petitioner, citing to the State evidentiary hearing records, proved the State court's decision was an unreasonable determination of the facts based on the evidence presented in the State court proceeding. Petitioner showed each of the State court's applicable fact findings were unsupported by evidence from the proceeding below. *See* Dkt. No. 7 at pp.35-71.⁷ Petitioner also proved the State court's conclusions of law to be unreasonable applications of clearly established federal law as well. *See* Dkt. No. 7 at pp.71-91.

As the Courts of Appeals have explained, sections (d)(2) and (e)(1) of 28 U.S.C. § 2254, at first, appear to be in conflict. But, these sections must be applied together giving meaning to each provision. The federal court first, under 2254 (d)(2), winnows those issues that are and are not entitled to a presumption of correctness.

“'[T]he language of § 2254(d)(2) and § 2254(e)(1) implies an important distinction: § 2254(d)(2)'s reasonableness determination turns on a consideration of the totality of the 'evidence presented in the state-court proceeding,' while § 2254(e)(1) contemplates a challenge to the state court's individual factual determinations, including a challenge based wholly or in part on evidence outside the state trial record. *See generally Taylor v. Maddox*, 366 F.3d 992, 999-1000 (9th Cir. 2004); *Valdez v. Cockrell*, 274 F.3d 941, 951 n.17 (5th Cir. 2001). Sections 2254(d)(2) and § 2254(e)(1) are, therefore, read together as addressing two, somewhat, different inquiries. The fundamental prerequisite to granting the writ of habeas corpus on factual grounds is consideration of the evidence relied upon in the state court proceeding. Section 2254(d)(2) mandates the federal habeas court to assess whether the state court's determination was reasonable or unreasonable given that

⁷ The citation is to the federal district court record.

evidence. If the State court's decision based on such a determination is unreasonable considering the evidence presented in the state court proceeding, habeas relief is warranted. Within this overarching standard, of course, a petitioner may attack specific factual determinations that were made by the state court, and that are subsidiary to the ultimate decision." *Lambert v. Blackwell*, 387 F.3d 210, 235 (3d Cir. 2004), *cert. denied*, 125 S.Ct. 2516 (2005).

The Ninth Circuit interprets the two provisions as applying to different stages of the habeas proceedings and notes the opinions on which it relies for its conclusions in the Supreme Court, the Seventh Circuit, the Ninth Circuit and the Fifth Circuit. It interprets 2254 (d)(2) as applying to challenges of the State court's findings based upon the record made in the State writ proceeding. These challenges can include that the finding on claim is unsupported by sufficient evidence; that the process employed by the State court was defective; or that no finding was made by the State court at all. *Weaver v. Thompson*, 197 F.3d 359, 363 (9th Cir. 1999). The Ninth Circuit states that the (e)(1) presumption of correctness only comes into play if the State court's fact-findings survive these intrinsic challenges.

“...Significantly, the presumption of correctness and the clear-and-convincing standard of proof only come into play once the state court's fact-findings survive any intrinsic challenge; they do not apply to a challenge that is governed by the deference implicit in the ‘unreasonable determination’ standard of section 2254(d)(2).” *Taylor v. Maddox*, 366 F.3d 992, 999-1000 (9th Cir. 2004), *cert denied*, 125 S. Ct. 809 (2004), *abrogated in part by*, *Cullen v. Pinholster*, *infra*.

The ellipsis in the above quote from *Taylor, supra*, removes the portion of the opinion abrogated by *Cullen v. Pinholster*, 536 U.S. 170, 131 S. Ct. 1388, 1400-1401 &nn. 7,10, 179

L.Ed.2d 557 (2011), that prohibits evidence presented in a federal habeas hearing from being used to overturn a decision without first remanding the case to the State court for its consideration of the evidence developed at the federal hearing that was not previously presented to the State court.

The question is, when Petitioner shows the State court's decision to be an unreasonable determination of the facts and law from the evidence presented at the State evidentiary hearing, should the federal district court should have reviewed the testimony and evidence introduced in the State hearing *de novo* per 28 U.S.C. § 2254(d)(2) & 28 U.S.C. § 2254(e)(1). *See also Foster v. Chatman*, 136 S. Ct. 1737, 195 L.Ed.2d 1, 25 (2016)[J. Alito, concurring]. After the federal district court maintained its denial of Petitioner's writ upon consideration of a motion for new trial, the Petitioner filed an application for a certificate of appealability, stating within that application that he was seeking to appeal the denial of the writ. When the district court denied a certificate of appealability, Petitioner sought a certificate of appealability in the Fifth Circuit Court of Appeals. But the Fifth Circuit declined to consider the application for a certificate of appealability, because in the Court's estimation, no notice of appeal had been filed in the district court. The Fifth Circuit dismissed Petitioner's appeal on February 21, 2018. Despite the fact that the Fifth Circuit recognizes a notice of appeal may be filed within the application for a certificate of appealability, the Fifth Circuit Court of Appeals would not entertain that fact in Petitioner's Motion for Reconsideration nor his Motion for *en banc* Reconsideration. The Court clerk explained the panel order was considered an administrative matter for which no Motion for Reconsideration or Motion for *en banc* Reconsideration would be

countenanced. No place in the Federal Rules of Appellate Procedure, the Local Fifth Circuit Rules or its Internal Operating Procedures do the rules provide that one cannot seek a panel reconsideration or *en banc* rehearing of a per curiam panel order. Nowhere in these rules is there any definition of an administrative panel opinion or notice that Petitioners may not seek reconsideration or review of such opinions.

Petitioner raised his claims in a federal writ which had jurisdiction of the case pursuant to 28 U.S.C. §2254. The district court denied the writ and Petitioner sought a certificate of appealability in that court within thirty days that also contained his notice of appeal. The Fifth Circuit permits a notice of appeal to be filed within the same document. *Stevens v. Heard*, 674 F.2d 320, 322 (5th Cir. 1982)[notice of appeal within certificate of probable cause is proper]. When the district court denied the certificate of appealability, Petitioner filed an application for a certificate of appealability in the Fifth Circuit Court of Appeals. The Fifth Circuit dismissed the appeal incorrectly stating that a notice of appeal had not been timely filed. *Anderson v. Davis*, No. 17-20614 (5th Cir. Feb. 21, 2018). This writ of certiorari is timely filed. Petitioner filed a motion for rehearing to the panel and a motion for a rehearing *en banc*, because he had timely filed a notice of appeal. The Fifth Circuit denied each of these motions on February 26, 2018 and March 6, 2018 respectively, stating that such motions could not be countenanced by the Court regarding such administrative matters. Denying Petitioner review of his application for a certificate of appealability denies him due process when he followed the proper procedure to vest the court of appeals with jurisdiction.

REASONS FOR ALLOWANCE OF THE WRIT

The Circuit Courts of Appeal are split in regard to the meaning and procedure addressed in 28 U.S.C. § 2254(d) (2) and 28 U.S.C. § 2254(e)(1). In *Fields*, the Fifth Circuit Court of Appeals recognized the split between the Circuit Courts regarding the meaning of and review accorded by 28 U.S.C. § 2254(d)(2) and 28 U.S.C. § 2254(e)(1). *See Fields v. Thaler*, 588 F.3d 270, 279 (5th Cir. 2009). More recently, the Eleventh Circuit recognized that the “precise standard for reviewing state court factual findings in habeas proceedings is somewhat murky.” *See Clark v. AG*, 821 F.3d 1270, 1286 n.3 (11th Cir. 2016). This question also lies unanswered in this Court.

This Court previously granted certiorari recognizing the split in the Circuit Courts of Appeals stating it was “a question that has divided the Courts of Appeals: whether in order to satisfy § 2254(d)(2), a petitioner must establish only that the state-court factual determination on which the decision was based was ‘unreasonable,’ or whether § 2254(e)(1) additionally requires a petitioner to rebut a presumption that the determination was correct with clear and convincing evidence.” *See Wood v. Allen*, 558 U.S. 290, 299, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010). The Court recognized that numerous Circuits have answered this question differently, noting the different tests used in the Third, Seventh, Eighth, and Ninth Circuits. *Wood v. Allen*, 558 U.S. at 299 n.1. The Courts of Appeals discussed in *Wood*, *supra*, reach different conclusions regarding how these

provisions are to be harmonized. *See id* at 300 n.2. But this Court did not resolve the question because it was unnecessary to the decision in that case. *See id* at 300.

The Fifth Circuit has determined that § 2254(d)(2) sets out a general standard by which the federal district court evaluates a state court's specific findings of fact while it concludes that § 2254(e)(1) provides what showing a petitioner must make for the federal district court to reject a state court's determination of a factual issue. *See Valdez v. Cockrell*, 274 F.3d 941, 951 n.17 (5th Cir. 2001). The Fifth Circuit there recognized that the Third, Fourth, Seventh, and Eighth Circuit Courts appear to have a similar understanding of these provisions, while distinguishing the Ninth and Eleventh Circuits' opinions, and noting that the First Circuit has agreed that the relationship between these provisions has caused confusion and has not been definitely resolved. *See Fields v. Thaler*, 588 F.3d at 279-80. Further, the Eleventh Circuit has remarked that the interaction between these two provisions is an open question. *See Clark v. AG*, 821 F.3d at 1286 n.3. Therefore, the first question presented raises an important federal question regarding which the Circuit Courts of Appeals are split and that is also unresolved by this Court. The second question raised also presents an important federal question that has not been resolved by this Court and will set the limits below which a State court may not go in securing a conviction consistent with due process. The due process clause protects persons from being convicted by a mistake or by an arbitrary or capricious process. Here, what the police officers do after an arrest in Texas can by mistake or arbitrary action

cause an offense of a higher grade and higher sentencing range to apply in any given case. Were the police to pour the alleged drug evidence in a sand box and collect the sand after arrest, under current Texas law, the defendant could be convicted and sentenced for a sand box weight of drugs. This does not comport with due process and places our courts and justice system in a position of distrust and disrepute. See e.g. *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). Even where one is losing their food stamps this Court has required a fair process. The Texas law as it currently stands permits injustice that this Court should correct. The due process clause, applicable to the States through the Fourteenth Amendment assure that criminal proceedings will be fair and just. The question of whether a State may criminalize the possession of matter that a person has not possess but that was added by the police after his arrest calls into question the fundamental fairness of the Texas adulterants and diluents law under the federal due process clause.

The third question raises a concern about due process as well. An undocumented administrative process that Petitioner could not predict deprived him of being heard about the timeliness of his notice of appeal under long recognized Fifth Circuit law. *Stevens v. Heard*, 674 F.2d 320, 322 (5th Cir. 1982). The Court of Appeals' decision to the contrary conflicts with another panel of the Fifth Circuit. This Court should grant Certiorari to resolve the conflict. The overruling of one panel of the Fifth Circuit in an unreviewable

opinion by another panel so far departs from the accepted and usual course of judicial proceedings as to call of the an exercise of this Court's supervisory power.

CONCLUSION

Because the Circuit Courts of Appeals are split on the analysis and procedure to be employed when reviewing State court decisions in writs of habeas corpus under 28 U.S.C. §2254 (d)(2) & (e)(1), this Court should grant certiorari to decide this important federal question. In addition, the allowance for a State drug conviction upon the weight of non-drug evidence that the police added after the Petitioner's arrest so departs from our notions of fairness and justice as to violate the due process clause. This Court should grant certiorari to decide the threshold below which no State can go in criminalizing non-criminal conduct for which the accused is not responsible, and which is unforeseeable to him consistent with the due process clause. In addition, this Court should exercise its supervisory power to prohibit the practice of declaring a panel opinion administrative and non-reviewable particularly when the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings by prohibiting review when the Petitioner has complied with the law in that Court of Appeals.

Respectfully submitted,

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