

Supreme Court, U.S.
FILED

DEC 26 2017

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

David Mark Isaacson - PETITIONER

VS

Lorie Davis - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI

United States Court of Appeals Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

David Mark Isaacson

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QUESTION(S) PRESENTED

1. Is the Texas Court of Criminal Appeals authorized to dispose of habeas applications in a manner which conflicts with the statutory requirements of the Texas Constitution and Code?

According to the T.C.C.A. Justice Alcala's analysis in Ex. Parte Dawson, "the Texas Constitution requires a decision by a quorum of judges on this Court, and thus, a denial of habeas relief by a single judge on this Court fails to comply with this requirement. While it is true that Texas Constitution gives individual judges on this Court the power 'to issue the writ of habeas corpus,' that power does not apply to Article 11.07 habeas applications because the Code of Criminal Procedure provides that the issuance of the writ in this context is done by the convicting court rather than by this Court as a whole or it's individual judges." Id, at 2.

"Furthermore, the Texas Constitution's mandate that a quorum of judges decide this Court's cases is not satisfied by what is effectively a standing order of this Court that permits an individual judge to act as a proxy for a quorum of judges on this Court on the basis of a pre-vote on a category of cases that are never actually individually seen by any judge other than a proxy judge," Justice Alcala continued, Id, at 3.

Considering the foregoing, did the T.C.C.A. err in delegating it's decision making responsibility to a proxy judge, in violation of the Texas Constitution and Code of Criminal Procedure?

2. Did the Court of Criminal Appeals misinterpret the governing law?

Justice Alcala explicitly stated; "Nothing in the Texas Constitution or statutes authorizes a single judge on this Court acting alone to decide habeas applications...Thus, a suggestion that a single judge on this Court may deny an Art. 11.07 habeas application because he is merely exercising his constitutional authority to decline to issue the writ is misguided." Id., at 3, 6.

"The plain language of Texas Constitution generally gives the judges on this Court the individual power to issue a writ, but that power is subject to regulation by legislature, which has decided not to permit the exercise of that power for Art. 11.07 writs. Subsection (c) in section Five of Article five of Texas Constitution discusses the power of each judge on this Court to "issue the writ", which means that the restrainer is commanded to bring the restrained person before the judge. /case/ex-parte-dawson-4#idml39939030882160 Tex. Const. Art. V, § 5(c). That section states:

"A judge's decision to issue a writ merely means a command to bring the restrained person before the judge; it does not mean that relief under the writ is being granted or denied. See Tex. Code Crim. Proc. Art. 11.07." Id., at 4.

In light of Justice Alcala's detailed analysis of Tex. Constitution and Code governing disposition of Art. 11.07 habeas applications by a quorum of judges, did the T.C.C.A. misinterpret the law when it held Justice Alcala "had the authority to lawfully deny Dawson's application by her signature alone--because this application satisfied the criterion in the Court's standing internal procedure?"

3. Does a single judge on the Court of Criminal Appeals have competent jurisdiction to deny Article 11.07 habeas applications?

It may be deduced from Justice Alcala's opinion, Texas Legislature has conferred competent jurisdiction upon a quorum of judges on the Ct. of Crim. App. to decide Art. 11.07 habeas applications. The decision of a single judge to deny habeas applications, is consequently, outside limiting constitutional or statutory authority.

There is no evidence that the Texas constitution or Statute suggests, 1. Texas Legislature intended to confer competent jurisdiction upon a single judge on the Ct. of Crim. App. to decide Art. 11.07 habeas applications. Whether he would be acting alone or as a proxy for a quorum of judges or 2. that C.C.A.'s decision-making responsibility is a delegable duty.

Upon further review, Justice Keasler argues that "long-established practice" of this Court that permits 11.07 writ applications to be administratively and randomly assigned to a single judge for review and resolution, is a substitute for the provisions of Texas Constitution and Code. Justice Keasler's opinion. Id at 2.

Considering these two opposing opinions, is the C.C.A. authorized to enact its own governing laws to delegate its competent jurisdiction upon a single judge, to act as a proxy for quorum of judges. Secondly, Because the Texas Legislature did not confer competent jurisdiction upon a single judge to decide habeas applications, is a decision rendered under such circumstances a void judgement?

4. Is the Court of Criminal Appeals authorized to override Texas Rules of Appellate Procedure, Rule 76?

Texas Rules of Appellate Procedure, Rule 76, Submission En Banc, states: "The Court will sit en banc to consider the following type of cases:(d) cases that were docketed under Code of Crim. Proc., Article 11.07 or 11.071."

The Legislative intent of enacting the above statute is clearly evident from its plain language. The statute requires the Ct. Crim. App. to convene en banc to consider the applications docketed under Code of Crim. Proc. Art. 11.07 or 11.071.

The explicit text of the above statute further confirms Justice Alcala's assertion that "Texas Const. mandates that a quorum of judges decide this Court's non-capitol cases. This Court's internal administrative procedure that effectively operates as a standing order to permit a single judge to deny habeas relief for certain catagories of Art. 11.07 habeas applications based on a predetermined proxy vote in the absence of actual consideration of each case by a quorum fails to comply with the Texas Constitution and Code." Id at 7.

It is especially noteworthy Justice Keasler in his response, conveniently refused to admit that provisions of Texas Rules of App. Pro., Rule 76(d) negates his argument. Because it requires the C.C.A. to convene en banc when considering Art. 11.07 habeas applications.

With this in mind, first, is the C.C.A. authorized to ignore the Legislative intent, and construct it's own internal administrative procedure to override Texas Rules of Appellate Procedure, Rule 76? And second, is the Court of Criminal Appeals internal administrative procedure constitutional?

5 . Did Trial Defense Counsel Render Ineffective Assistance By Failing To Communicate A Plea Bargain Offer From The State In Violation Of The U.S. Const. Amend. Six And Fourteen?

According to Strickland v. Washington, 466 U.S. 668 the Court held: "The right to counsel is the right to effective assistance of counsel." In Missouri v. Frye, 132 S.Ct. 1399, 1405 (2012) the Court concluded, it is well settled that the right to effective assistance of counsel through the "Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings," and this constitutional right to counsel extends to the negotiation and consideration of plea offers that are rejected or lapse.

In Frye a state court denied the postconviction, but the Missouri Ct. of App. reversed, 311 S.W. 3d 350. The court first determined, counsel's performance was deficient because the "record is void of any evidence of any effort by trial counsel to communicate the Offer during the Offer window." This is exactly what we have here, proving counsel's deficient performance. Second the court concluded Frye had shown his counsel's performance caused him prejudice because "Frye pled guilty to a felony instead of a misdemeanor and was subject to a maximum sentence of four years instead of one." Although Petitioner pleaded not guilty, he would have considered the probation or ten year offer instead of the fifteen minimum. Like Frye this shows prejudice.

Was counsel's performance deficient and did this deficiency cause prejudice to Isaacson by denying his U.S. Const. rights?

6. Were The Findings Of Fact In State Habeas Proceedings
Entitled To Presumption Of Correctness?

In present case, the state habeas judge did not preside over Petitioner's criminal trial. Consequently, he lacked the advantage of personal recollection of trial proceedings.

The habeas judge did not hold live testimony, but instead, relied on paper hearing in spite of the fact that "paper hearing" and "trial by affidavit" was insufficient under the circumstances according to the Fifth Circuit in *Perillo v. Johnson* 79 F. 3d 441.

The court held: "Where judge in habeas petitioner's capital murder trial was not the state habeas judge and the state habeas judge conducted only a paper hearing and could not compare the information presented in various affidavits against any first hand knowledge of the trial, there was a danger of "trial by affidavit," and findings of fact in state habeas corpus proceeding were not entitled to presumption correctness." *Id.*, at 442.

The Fifth Circuit in *Valdez v. Cockrell*, 274 F. 3d 941, 960, further affirmed its reliance on the advantage of habeas judge personal recollection of the trial proceeding. The Court held: "This Court has heavily relied on this advantage when deciding whether "paper hearings" are full and fair."

In light of the above, were the findings of fact in state habeas corpus proceedings entitled to presumption of correctness?

7. Was the Texas Court of Criminal Appeals decision to deny petitioner's writ in conflict with 28 U.S.C. § 2246, precedent set in federal court and the Texas Code of Crim. Procedure as well as it's own order?

The T.C.C.A. denied petitioner's 11.07 habeas corpus writ based on the findings of facts and conclusions of law by the convicting court without written order without hearing on June 7, 2015 almost exactly 5 months after issuing a written order to the lower court to hold an evidentiary hearing.

28 U.S.C. § 2246 states: If affidavits are submitted any party shall have the right to propound written interrogatories to the affidavit or file answering affidavits, which was done, contesting defense counsel's affidavit in it's entirety.

Contested facts may not be decided on affidavit alone unless record supports affidavit. *Jordan v. Estelle* 594 F.2d 144-46. Because there is no evidence to support defense counsel's affidavit the court unreasonably determined defense counsel to be credible. For the court to rely on a "paper hearing" and refuse to hold a live "in person" evidentiary hearing in light of these contested facts undermined integrity and reliability of fact finding process & presumption of correctness ordinarily accorded to state courts.

Were petitioner's due process rights violated by the TCCA when they admittedly disregarded their own order, or allowed a contested affidavit without supporting evidence to negatively influence the determination of petitioner's 11.07 writ?

8. Was defense trial counsel's performance deficient to the requirement of the U.S. and Texas Constitutions and the Supreme Court ruling in Strickland v. Washington by failing to recognize and exploit sound defense strategy?

The Sixth Amendment, applicable to the States by the terms of the Fourteenth Amendment, provides that the accused shall have the assistance of counsel in all criminal prosecutions. The right to counsel is the right to effective assistance of counsel. See Strickland v. Washington, 466 U.S. 668, 686 (1984).

During trial defense counsel argued Self Defense, Use of Force and Mistake of Fact. He specifically requested, from the court, that the jury be instructed on each issue. These requests were denied systematically each time. See: CRR Vol. 4 pg 6-12.

In order to be granted the instruction, the accused must admit all the elements of the alleged crime. Defense counsel argued there was no crime, yet requested the instruction. This clearly indicates defense counsel's performance was deficient by the standards set in Strickland Id.

Although petitioner admits he armed himself with a legally owned handgun, for defense purposes only, to protect himself and his property from what he fully and reasonably believed to be a retaliatory attack from two men (criminal trespassers) he had evicted from his home earlier, this was not enough for the instruction according to the court.

Texas Penal Code § 22.02 Aggravated Assault (a) A person commits an offense if the person commits assault as defined in Sec. 22.01 and the person (2) uses or exhibits a deadly weapon during the assault.

Was defense counsel's ignorance of the law deficient performance held in Strickland and a violation of the VI and XIV Amend.

9. Had defense counsel utilized the defense of the "castle doctrine" rather than the feable attempt of self defense, use of force and mistake of fact would the result of the proceedings been different?

The Castle Doctrine was made effective on Sept. 1, 2007. Although this was relatively new at the time, defense counsel knew of its existence and made casual mention of it, CRR Vol 4 pg. 34. Under certain conditions the castle doctrine may be used for defense.

In the present case all of the conditions existed and is supported by the evidence and the record and cannot be refuted. The request for the instruction on self defense and use of force be given to the jury, which were both denied by the court, would not have been necessary had defense simply applied the castle doctrine defense because both self defense and use of deadly force is authorized here.

The castle doctrine is defined in Black's Law Dictionary 10 Ed. pg. 261 as: An exception to the retreat rule allowing the use of deadly force by a person who is protecting his or her home and it's inhabitants from attack, especially from a trespasser who intends to commit a felony or inflict serious bodily harm. See: retreat rule, BLD 10th Ed. pg. 1511; The doctrine holding that the victim of an assault has the duty to withdraw instead of resorting to deadly force in self defense, unless (1) the victim is at home or his/her place of business (the so called castle doctrine).

Here the record does reflect, and the evidence is consistant from everyone, the so called victims, states own witnesses, and Petitioner that petitioner never left his home, he believed he was under attack from two criminal trespassers seeking retaliation for being evicted earlier.

Knowing this, was defense counsel's performance deficient by the standard set forth in Strickland and the U.S. Const. Amend. VI and XIV?

10. Was State And Federal Courts Failure To Recognize
Sleep Inertia/Automatism As A Legitimate Ground For
Relief In Violation Of Due Process?

The Third Court of Appeals in it's opinion to Petitioner's direct appeal regarding sleep inertia/automatism concluded, "He did not request an instruction specifically addressed to this theory, however, so it attaches to this appeal, if at all, through the three instructions that are the subject of expressly stated issues on appeal." Id at 3.

The discussion in Isaacson's Direct Appeal pg. 18-22, standing on its own, details, with authorities, the issue of sleep inertia. The relevancy to self defense and use of force, that the court misapplied, was only to demonstrate under the circumstances petitioner, while functioning within the legal boundaries was operating in sleep inertia.

In this condition it is not unreasonable to conclude a person may remember segments of activity, and have no recollection of others. The point being...this argument establishes with a high degree of certainty, Mr. Isaacson, having no recollection of pointing a weapon toward deputies, which remains questionable given the evidence supported by the record and police action, was himself operating in sleep inertia. If true, substantial questions surface like, did Petitioner have the requisite mental state in order to be criminally culpable, was there intent or motive among others.

Is the court(s) correct in finding this ground improperly presented or were Isaacson's Due Process Rights violated?

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:

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- EXHIBIT "B" Justice Keasler's Opinion in Texas Court of Criminal Appeals, Ex Parte Dawson 11/23/2016
- EXHIBIT "C" Internet Cite, Grits for Breakfast; Discussion on Alcala's Opinion, Id. Dawson 11/26/2016
- EXHIBIT "D" Pttitioner's Direct Appeal in Texas Third Court of Appeals, Filed 6/30/2011
- EXHIBIT "E" Petitioner's Motion for Rehearing in Texas Third Court of Appeals, Filed 5/23/2013
- EXHIBIT "F" Petitioner's Petition for Discretionary Review in Texas Court of Criminal Appeals, Filed 10/18/2013
- EXHIBIT "G" Petitioner's Application for Writ of Habeas Corpus Art. 11.07 in State District Court, Filed 9/23/2014
- EXHIBIT "H" Petitioner's Petition for a Writ of Habeas Corpus in U. S. District Court, Filed 8/5/2015
- EXHIBIT "I" Respondent's Answer With Brief in Support in U. S. District Court, Filed 11/19/2015
- EXHIBIT "J" Petitioner's Reply Brief in U. S. District Court, Filed 2/14/2016
- EXHIBIT "K" Petitioner's Application for Certificate of Appealability in U. S. Court of Appeals Fifth Circuit, Filed 10/17/2016

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EXHIBIT "M" Court Reporters Record, Pages 33-51 of Volume 4.

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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 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 United States district court appears at Appendix C to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

☐ 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

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 8-3-2017.

☐ 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: 9-28-2017, and a copy of the order denying rehearing appears at Appendix B.

☐ 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

The following constitutional and statutory provisions are involved in this case.

U.S. CONST. AMEND. V (1791)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation.

U.S. CONST. AMEND. VI (1791)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. CONST. AMEND. XIV (1868)

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the

United States and 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 laws.

TEXAS CODE OF CRIMINAL PROCEDURE ARTICLE 11.07

Procedure After Conviction Without Death Penalty

Sec. 3.(b) An application for a writ of habeas corpus filed after final conviction in a felony case, other than a case in which the death penalty is imposed, must be filed with the clerk of the court in which the conviction being challenged was obtained, and the clerk shall assign the application to that court. When the application is received by that court, a writ of habeas corpus, returnable to the Court of Criminal Appeals, shall issue by operation of law.

Sec. 3.(d) If the convicting court decides that there are controverted, previously unresolved facts which are material to the legality of the applicant's confinement, it shall enter an order within 20 days of the expiration of the time allowed for the state to reply, designating the issues of fact to be resolved. To resolve those issues the court may order affidavits, depositions, interrogatories, additional forensic testing, and hearings, as well as using personal recollection.

Sec. 5. The Court of Criminal Appeals may deny relief upon the findings and conclusion of the hearing judge without docketing

the cause, or may direct that the cause be docketed and heard as though originally presented to said court or as an appeal.

TEXAS RULES OF APPELLATE PROCEDURE

TRAP 76. Submission En Banc. The Court will sit en banc to consider the following types of cases:

- (a) direct appeals;
- (b) cases of discretionary review;
- (c) cases in which leave to file was granted under Rule 72;
- (d) cases that were docketed under Code of Criminal Procedure articles 11.07 or 11.071;
- (e) certified questions; and
- (f) rehearings under Rule 79.

TRAP 79. Rehearings.

- (d) A motion for rehearing an order that denies habeas corpus relief under Code of Criminal Procedure, articles 11.07 or 11.071, may not be filed. The Court may on its own initiative reconsider the case.

28 U.S.C. §2251. Stay of State Court Proceedings

- (a) In general—
 - (1) Pending Matters— A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

28 U.S.C. §2246. Evidence; Depositions; Affidavits

On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interroga-

tories to the affiants, or to file answering affidavits.

28 U.S.C. §2254. State Custody; Remedies in Federal Courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning

of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant 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.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of 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.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and

any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

STATEMENT OF THE CASE

No Remedy At Law At State Or Federal Level

Mr. Isaacson was convicted of aggravated assault on a peace officer two counts. There were no injuries nor any attempt to injure. This statement is supported by both the evidence and the record. Mr. Isaacson appealed the verdict and conviction to the appropriate state and federal courts citing various violations of his state and federal constitutional rights as well as statutes and precedence previously establishing law.

First and of monumental proportion is the newly released opinion from Justice Alcala in the Ex parte Dawson Art. 11.07 WRIT NO. WR-85,612-02 (Tex. Crim. App. Nov. 23, 2016) case. The information contained within her opinion questions the validity of the T.C.C. A. decisions in Art, 11.07 applications for writ of habeas corpus writs. Her opinion discloses the unlawful procedure used not only in Dawson but decades worth of writs involving tens of thousands of writ applications including petitioners, which was denied on the finding of facts and conclusions of law by the convicting court without a written order, without a hearing. This was signed by a single judge, Judge Keller. There was no opinion.

Petitioner's fundamental rights to due process of the law was violated where a standing order of T.C.C.A. allowed a lone judge to deny his writ of habeas corpus on the basis of a pre-vote on a category of cases that are never actually individually seen by any other judge other than a proxy judge. This impediment deprived Petitioner from a full and fair appellate hearing and prevented

the T.C.C.A. from reaching the merit of his case.

"I would hold that a single judge on this Court who decide Article 11.07 habeas applications based on his solo vote acts in a manner that is unauthorized by the Texas Constitution and Code." Justice Alcala, Ex Parte Dawson, Id., at 10.

Petitioner contends that T.C.C.A.'s approach in disposing of his habeas application is to inconsistent with uncompromising requirements of Texas Constitution and Code. This inconsistency renders the decision of the T.C.C.A. to deny his habeas application by a vote of a single judge, highly unreliable and constitutionally suspect. The T.C.C.A.'s approach raises serious doubt about the integrity of criminal appellate system in Texas.

"The bottom line is that this Court has adopted internal procedures that conflict with statutory and constitutional provisions requiring a quorum of the judges to make decisions on whether relief should be denied by permitting certain categories of habeas cases to be decided by a single judge without a vote by the en banc Court. In a substantial number of Article 11.07 habeas applications this Court has delegated its decision-making to staff attorneys who decide whether only a single judge will decide it. This practice is unauthorized by the Texas Constitution and Code provisions that require a quorum of judges to decide habeas applications, and that requirement is not fulfilled by a standing order or proxy pre-vote, sight unseen, on whole categories of cases." Justice Alcala, Ex Parte Dawson, Id at 10.

To further support Mr. Isaacson's stance that his habeas application was not determined by a quorum of judges or the court en banc as required by law, thus violating his due process con-

stitutional Amend. 5 and 14 rights. Other than the order denying his 11.07 habeas application being signed by only a single judge without a hearing, without written order, is the fact had more than one judge been involved certainly one of them would have noticed the order denying the writ was incorrect. This is because on January 14, 2015 the T.C.C.A. by written order required the convicting district court to hold an evidentiary hearing.

Alcala continues, "there are three, maybe four CCA judges who reflexively side with the government in all cases. These judges can be counted on to reject defense arguments not so much because they're wrong, but simply because they come from the defense, whom they like to blame even for problems that prosecutors cause. So any writ that goes to Sharon Keller, Barbara Hervey, Michael Keasler, and in non-death cases, probably Kevin Yeary are apt to get rejected and round filed no matter what the situation. " Please recall petitioner's habeas petition was denied by the single signature of Justice Sharon Keller, without written order without a hearing, on 6/17/2015, almost exactly five months after issuing an order to remand for evidentiary hearing which was dated on 1/14/2015 and bears the single signature of Justice Sharon Keller.

Petitioner filed his Article 11.07 writ of habeas corpus with the convicting district court which was denied. The TCCA apparently by a single proxy judge, reviewed the 11.07 and determined there were claims that if true would entitle petitioner to relief. Judge Keller, with no way to sidestep this fact, issued a written order to the convicting court to hold an evidentiary hearing or, as an alternative require trial defense counsel to submit affi-

davit. The trial court may use any means set out in Tex. Code of Criminal Procedure Art. 11.07 §3(d), or the court may rely on personal recollection.

Judge Charles Ramsey was the Presiding Judge during trial. Judge Bruce Boyer (Judge presiding over habeas proceedings), rendering personal recollection moot. An order denying petitioners 11.07 based on defense counsel's affidavit, which was/is unsupported by documentary evidence, unsupported by the record, and contested in its entirety through Petitioner's answering affidavit was issued.

28 U.S.C. § 2246 states: "On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affidavits or to file answering affidavits."

Contested facts may not be decided on affidavits alone unless record supports affidavit; *Jordan v. Estelle* 594 F. 2d 144-46 (5th Cir.) 1979. For Judge Boyer to conclude defense counsel is credible through contested affidavit, completely unsupported by the evidence and the record simply because the court is familiar with him undermines the integrity and reliability of fact finding process, and presumption of correctness ordinarily accorded to state courts. To do so violates federal statute 28 U.S.C. § 2254(d) and petitioner's Amendment 14 right to due process of law.

When Judge Boyer's "ordered" findings of fact and conclusions of law finally made it back to Justice Keller in the C.C.A. she

automatically, denied petitioner's 11.07 without written order without hearing based on trial court's opinion. Apparently totally unaware she had issued the order.

Defense counsel failed to inform/communicate to Mr. Isaacson two separate plea bargain offers from prosecution for his consideration. Although he claims he did, through his requested affidavit, that was accepted as true by the district court, there is absolutely no evidence to support this claim.

Petitioner says he never knew about an offer until defense counsel sent him copies of everything he had once he was imprisoned. The documentary evidence i.e. the actual plea bargain form, lacks any initials or signatures accepting or rejecting the offer. There is no bartering record for a better deal. There is nothing in the court reporters record that mentions, refers to, or discusses a plea offer. There is no proof from anyone, that the offer was ever extended to Mr. Isaacson, Period!

The defensive strategy that no crime took place was reasonable with a strong tactical plan by the letter of the law. Defense never established either. During trial, defense relentlessly pursued the self defense, use of force and mistake of fact argument. He in fact asked the judge to instruct the jury on each issue, and was denied each time. In order to get the instruction as defense should have known, the accused must admit all the elements of the crime. See CCR Vol.4 pg 6-12.

Because defense counsel decided to argue the definition of the "castle doctrine" and only once in closing associated the self defense and use of force as the castle doctrine the jury

was prevented from ever considering the fact that petitioner was allowed, under the "uncontested and proven facts" to use any force necessary to protect himself and his property from attack, in self defense under the protection of the castle doctrine.

A law that became effective on September 1, 2007 in the state of Texas and obviously known to exist by defense counsel.

The U.S. Supreme Court in 1984 ruled in Strickland v. Washington 104 S. Ct. 2052, 2064-66 that assistance of counsel is "effective assistance" and anything less if proved would be a 5th and 14th Amend. violation. The question here, and has been, 'was petitioner's defense attorney's performance unreasonable under prevailing professional standards and is there a reasonable probability that but for counsel's unprofessional errors, the result would have been different.'" Id at 2068.

Here there is no question that defense counsel repeatedly fell short of any professional standard, and Certiorari should be granted. See: CRR Vol. 4 pg 33-51.

Finally, appellate counsel included in direct appeal the detailed argument of "sleep inertia/automatism" as a possible explanation of petitioner's conduct on the night in question, and the reason he has no recollection of portions of the events that took place. See Direct Appeal Ex. " D " pg. 18-22.

On pg. 3 of Tex. 3rd Ct. of App. Opinion rendered 5/10/2013 fn 1, the court in part, on the subject of sleep automatism stated: "He did not request an instruction specifically addressed to this theory, however, so it attaches to this appeal, if at all, through the three instructions that are subject of expressly stated issues on appeal."

It is apparent everyone has "jumped on that bandwagon" as they all agree with the 3rd Ct. of App., and refuse to consider sleep automatism because of the way it was presented in direct appeal on the shoulder of self defense and use of force. In federal district court, the respondent in her answer brief on pg. 12, see Ex. "I", fn 4 agrees with and quotes the 3rd Ct. of App., "did not request an instruction specifically addressed to this theory." She continues, "...a claim that the trial court erred in failing to instruct the jury on sleep automatism cannot have been properly raised to the TCCA in Isaacson's PDR."

Unless petitioner is mistaken, she is clearly admitting that defense appellate attorney, a licensed attorney specializing in appeals, has no idea how to present an appeal.

If Automatism is action or conduct occurring without will, purpose, or reasoned intention, such as sleep-walking this negates the mental culpability to commit a crime. Even if one occurred in the instant case. Furthermore this negates the requirement of willingly, knowingly, needed to establish assault.

From the above information this Honorable Court must be in agreement that Petitioner's U.S. Constitutional Amendment Rights V, VI, XIV were violated and Certiorari should be granted.

REASONS FOR GRANTING THE PETITION

1. The Court should grant this Certiorari in the interest of justice, to restore confidence in the Texas judicial system, and to protect the constitutional rights of thousands of defendants to a meaningful appellate review. If the Supreme Court were not to intervene, the significant unfairness in Texas' judicial system, and constitutional flaw in its appellate proceedings would contribute to the ongoing risk of wrongful convictions to be sustained for decades to come.

2. Petitioner was denied relief in a manner that is unauthorized by the Texas Constitution and Statutes. Petitioner alleges that the unconstitutional "standing order" of T.C.C.A. that permitted a single judge to deny his habeas application by her solo vote violated his constitutional rights under the Due Process Clause to an objectively reasonable appellate review. This is especially true in light of this Honorable Court's ruling in *Trevino v. Thaler*, where this Court held; "When a state opts to act in a field where its action has significant discretionary elements, such as where it establishes a system of appeals as of right although not required to do so, it must nonetheless act in accord with the Due Process Clause." Pg. 838, 133 S. Ct. 1911 (2013).

3. Petitioner further, calls on this Honorable Court to grant his petition because, there is documentary evidence that the State of Texas denied him a meaningful appellate review at every stage of his appeal;

First, the Third Court of Appeals failed in its duty per

Texas Rules of Appellate Procedure 38.9 (b) Substantive Defects; "if the court determines, either before or after submission, that the case has not been properly presented in the briefs, or that the law and authorities have not been properly cited in the briefs, the court may postpone submission, require additional briefing, and make any other order necessary for a satisfactory submission of the case." See opinion 3 fn 1;

Second, a lone judge on the C.C.A. acting as a proxy for a quorum of judges refused to hear his Petition for Discretionary Review, in violation of Tex. Rules of App. Proc., Rule 76 (B);

Third, the C.C.A.'s unconstitutional "standing order" denied him an opportunity to present his habeas application to a quorum of judges on the C.C.A. for resolution;

Fourth, the findings of fact signed by the habeas judge and adopted by a single judge on the C.C.A., were not entitled to presumption of correctness, according to the Fifth Circuit in Perillo. Because, the habeas judge who did not preside over the trial relied on paper hearing and trial by affidavit, rather than live testimony;

Fifth, Petitioner's habeas application was denied by a single judge on the C.C.A. who lacked judicial authority. The lack of judicial authority renders the decision of the lone judge void;

Sixth, the C.C.A. failed to obey its own order and denied Petitioner's habeas application without written order without evidentiary hearing, when it ordered just exactly that;

Seventh, the C.C.A. internal procedure by reason of its design and operation did not allow the "Court" to reach the ultimate merits of Petitioner's case.

4. Petitioner's defense counsel rendered ineffective assistance by failing to communicate not one but two plea bargain offers. The record and documentary evidence both support Petitioner's claim. In *Missouri v. Frye* S. Ct. 1399, 1405 this Honorable Court in 2012 determined, the right to counsel per Amend. Six U.S. Const. extends to the negotiation and consideration of plea offers that lapse.

5. The Honorable Court certainly must agree defense counsel was ineffective and his performance fell below any reasonable standard as set in *Strickland v. Washington*, 466 U.S. 668, 686 (1984) and upheld in thousands of cases since. It seems pointless to base the complete defense on the premise that no crime took place and then request the court to instruct the jury on use of force, self defense and mistake of fact. The Texas law is very specific, the defendant must admit every element charged by indictment to be granted the instruction. To not understand this basic requirement from seasoned counsel defies belief and is totally baffling.

6. In yet another blatant display of IAC that would require the petition to be granted by this Court is defense spent the entire trial trying to successfully argue that under the circumstances Petitioner was authorized in self defense, to use force to the degree necessary to prevent injury and repel an attack. Had counsel established early on that Petitioner was, although unknown to him, acting within the lawful bounds of the "Castle Doctrine" it would have been obvious to the jury Petitioner had every reason to believe he was under attack, was authorized by the doctrine to use force because he never left the confines of

his home, therefore, had no duty to retreat. But he did not, he only remotely connected them all together once in closing, to little to late.

7. Finally the Honorable Court should grant Petitioner's Writ of Certiorari because the Texas Third Court of Appeals failed to even consider Petitioner's ground for relief based on Sleep Inertia/Automatism although it was discussed in detail with precedence and authorities. Their reasoning is it was improperly presented. Everyone else right up the line has nodded up and down in agreement.

This issue is extremely complex as it ties in with, fits perfectly, with the evidence and testimony. Both deputies statements and testimony claim Petitioner had a blank look on his face and never said a word. Petitioner claims he never pointed the gun at them. Used as a defense, automatism can negate the requisite mental state of voluntariness for the commission of a crime. But then, if the argument was improperly presented that would constitute ineffective assistance of appellate counsel. The bottom line is the court cannot say it was improperly presented without admitting it was ineffective assistance that caused it. A stay was requested to Fed. Dist. Ct. and denied

These issues illustrate a menagerie of constitutional violations. As a result a Certiorari should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

David M. Lawrence

Date: 12/22/2017