

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

BRUCE A. CRISWELL-PETITIONER

vs.

THE STATE OF TEXAS-RESPONDENT(S)
ON PETITION FOR A WRIT OF CERTIORARI TO

5th Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF THIS CASE)

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

QUESTION ONE: Can evidence, allegedly accumulated on dates not presented in the indictment, be used to prove essential elements of dates in the indictment, to obtain a guilty verdict beyond a reasonable doubt?

QUESTION TWO: "Whether if an extraordinary case is present in Petitioner's pleadings to warrant this Courts review on its unsolved question in Mcquiggin v. Perkins of a prisoners entitlement to habeas relief based on a freestanding claim of actual innocence?"

QUESTION THREE: "Whether if, when the record clearly indicates the need of adversarial expert testimony, will Petitioner's claim regarding trial counsel's failure to investigate and present expert testimony overcome conclusory doctrine law to warrant habeas relief?"

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 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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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☒ is unpublished.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 B 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☒ is unpublished.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 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☐ is unpublished.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☐ is unpublished.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 October 11, 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: _____, and a copy of the order denying rehearing appears at Appendix _____.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. _____ A _____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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

The date on which the highest state court decided my case was _____. 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 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

U.S.C. 6th Amendment

" 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.C. 14th Amendment

" 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 laws."

STATEMENT OF THE CASE

On the plea of not guilty for the alleged charges of indecency with a child and four counts of aggravated sexual assault of a child, occurring between the dates of January 1, 2005 up to July 15, 2006, Petitioner was convicted by a jury and received 10 years for the indecency charge and 20 years for each aggravated sexual assault of a child all run consecutively.

Petitioner's redress and contentions throughtout the courts up to this point has been, (raised under an ineffective assistance claim on direct appeal), that the State of Texas has broaden the Jackson v. Virginia legal sufficiency standard to engulf acts alleged to have happened after the presentment of the indictment (in 2008), to prove acts alleged to have happened between the years 2005-2006 (as defined by the indictment), in violation of the 14th amendment. (Pet. Certificate of Appealability "COA" brief pg. 2-7).

In addition, Petitioner has raised an ineffective assistance claim for failure to investigate and request expert testimony to show that (1) Medical proof would give meaning of the absence of trauma to sexual organs, raising doubt as to Petitioner's guilt in light of the nature of alleged conduct and (2) Testimony of the probability of induced false memory would explain, and the record confirms, that complainants recollection of events tends to be tampered with, in violation of the 6th amendment. (Pet. "COA" brief pg. 10-16).

The Eastern District Court afforded "Presumption of Correctness" to the State courts findings and denied Petitioner federal habeas relief on the above issues opined that appellate counsel was not ineffective for failure to raise legal sufficiency on direct appeal and that Petitioner's claims on trial counsel for failure to investigate and request expert testimony were conclusionary and didn't warrant habeas relief under 28 U.S.C. § 2254. The 5th Circuit of Appeals also denied the issuance of a Certificate of Appealability on these issues.

Petitioner raises questions for this Courts consideration on the above issues, and presents also for this Courts re-consideration the question of whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence. (revisit on this Courts opinion in McQuiggin v. Perkins, 133 S.Ct. 1924 2013).

REASONS FOR GRANTING PETITION

Petitioner's request for writ of certiorari encompasses reason(s) that show:

Rule 10 (A) The 5th Circuit Court of Appeals has sanctioned the State courts departure from acceptable and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power, and

Rule 10 (C) has decided an important federal question in a way that conflicts with relevant decisions of this Court.

QUESTION ONE: "Can evidence, allegedly accumulated on dates not presented in the indictment, be used to prove essential elements of dates in the indictment, to obtain a guilty verdict beyond a reasonable doubt?"

The indictment in the instant case charged Petitioner with aggravated sexual assault and indecency of a child during the year of 2005-2006 when the complainant was 5 or 6 years old. The State's burden was to prove, beyond a reasonable doubt that Petitioner not only sexually assaulted SB, but also, because it was alleged in the indictment, that the alleged conduct happened between 2005-2006 when complainant was 5 or 6 years old. However, the evidence presented at trial indicates that:

- * SB stated that alleged conduct happened when she was 8 years old (two years ago from testimony in 2008. 3 RR p. 115, 133)
- * SB also stated that Petitioner never did anything to her at the age 5 or 6 (2005-2006) 3 RR pg. 165, 166.
- * SB mom testified to no illegal conduct before 2008. 3 RR pg. 217; See also Id. at 255-327

Although S.B. also testified that the alleged conduct happened when she was 6 years old, she could not remember what happened

REASONS FOR GRANTING PETITION (continued)

ned. Id. pg. 137. This testimony was discredited by other State's testimony that indicated SB being in England with her father in 2006 (age 6) and didn't return to the States until 2007. See 3 RR pg. 252-53.

The State could not meet its burden of proof of the alleged charges in the indictment because no testimony procured as of what was done in 2006 because SB could not tell what happened during that time coupled with the impossibility of SB being in two States at one time i.e., in England with her father, and in the State's being allegedly molested by the Petitioner.

Therefore, all the evidence of sexual abuse conduct revolves around the year 2008 where the specific allegations are centered. Petitioner contends that because a conviction was procured on the above evidence on a date alleged after the presentment of the indictment, the 5th Circuit Court of Appeals has sanctioned the lower courts departure from this Court's acceptable and usual course of judicial proceedings under Jackson v. Virginia's standard for legal sufficiency reviews.

ARGUMENT AND AUTHORITY

It is axiomatic that a conviction upon a charge not made, or upon a charge not tried, constitutes a denial of due process. Cole v. Alabama 333 U.S. 196, 201, 68 S.Ct. 514, 92 Led 644; Presnell v. Georgia 439 U.S. 14, 99 S.Ct. 235, 58 Led 2d 207. Therefore, the constitution prohibits the criminal conviction of [any] person except upon proof of guilt "beyond a reasonable doubt". In Re Winship 397 U.S. 358, 90 S.Ct. 1068, 25 Led 2d 368.

In this respect, the lower court's have expanded criminal liability to encompass crimes alleged to have been committed on a date after the presentment of the indictment.

This Court in Jackson v. Virginia 443 U.S. 307, 99 S.Ct. 2781, 61 Led 2d(1979) validating the Winship principles dictated that the due process clause of the 14th amendment protects a defendant in a criminal case against conviction except upon proof beyond a reasonable doubt of every fact necessary to commit the crime charged. Id at 314-316, quoting Winship 397 U.S. at 364, 90 S.Ct. at 1068.

This Court further held that because the standard, "proof beyond a reasonable doubt", plays a vital role in the American scheme of criminal procedure, because it operates to give "concrete substance" to the presumption of innocence, to ensure against unjust conviction and to reduce the risk of factual error in a criminal proceeding, Id., this Court has never departed from the Winship understanding stated above, nor the purpose it serves. See e.g. Ivan v. City of New York 407 U.S. 203, 204 92 S.Ct. 1951, 32 Led 2d 659; Lego v. Twoney 404 U.S. 477, 486-487, 30 Led 2d 618; 92 S.Ct. 619, and Cool v. U.S. 409 U.S. 100, 104, 34 Led 2d 335, 93 S.Ct. 354.

The State court of last resort, in applying the above legal standard, has agreed in other cases with the precedent enuciated in Jackson v. Virginia Supra. For example, in its plurality opinion, the Court of Criminal Appeals in Brooks v. State, 323 SW3d 893, 895 (Tx.Cr.App.2010) affirms these principles holding that

a proper analyst of Jackson v. Virginia rejects the sufficiency test that requires a finding that no evidence supports the verdict because it affords inadequate protection against potential misapplication of the "reasonable doubt" standard in criminal cases. Id at 915 (J. Cochran concurring). The Brook's court also verified that rather than meeting a mere no evidence test, legal sufficiency is judged not by the quantity of evidence, but by the quality of the evidence and the level of certainty it engenders in the fact finders's mind. Id at 917. The Brooks court, for an example, gave its hypothetical to promote the quality of evidence needed to sustain a conviction states "the store clerk at trial identifies defendant A as the robber"... A properly authenticated surveillance video tape of the event clearly shows that B committed the robbery. But the jury convicts A. It was within the jury's prerogative to believe the store clerk and disregard the video but based on all the evidence, the jury's finding of guilt was not a rationale under this example, the evidence is legally [in] Sufficient".

The evidence in the present case is the same. SB contends that Petitioner sexually assaulted her, 1st during the years of 5 or 6, but she also testifies that nothing happened when she was 5 or 6, nothing happened at all, nothing happened until she was 8 years old which would be 2008, after presentment of the indictment, 3 RR pg. 115, 133, 3 RR pg. 165, 166, 3 RR pg. 217, 255-57. Also to support against the verdict in the light most favorable to the verdict, was her own father's testimony which stated that SB was with him in England, which makes the

sexual abuse and its timing non-existing. 3 RR pg. 252-53.

The only evidence left to consider is the exact allegations surrounding the year 2008 after the presentment of the indictment on which Petitioner was tried. A conviction based on this evidence is wholly devoid of any relevant evidence of a criminal element of the offense charged and is constitutionally infirmed. Bodie v. Connecticut 401 U.S. 371, 377-379, 91 S.Ct. 780, 28 Led 2d 113.

In conclusion, the Jackson v. Virginia court held also that a federal court has a duty to assess the historical facts when it is called upon to apply a constitutional standard to a conviction obtained in a State court, Id at 318, and held that habeas relief is entitled to a Petitioner if it is found that upon the record evidence adduced at trial, that no rational trier of facts could have found proof of all the essential elements of the offense committed beyond a reasonable doubt Id.

The district court and 5th Circuit Court both agreed that Petitioner's appellate counsel did not render ineffective assistance of counsel in failing to raise this legal sufficiency claim, because the evidence presented above was legally sufficient. District Court opinion at 12, 14; Appendix A, B.

QUESTION TWO: "Whether if an extraordinary case is presented in Petitioner's pleading to warrant this courts review on it's unresolved question in Mcquiggin v. Perkins, of a prisoner's entitlement, entitlement to habeas relief based on a freestanding claim of actual innocence?"

The Petitioner incorporates the facts presented in question number one into this question as explained. In 2013, the United

States Supreme Court in McQuiggin v. Perkins has not resolved the Petitioner's question when it held:

"Decision of this Court support Perkins' view of the significance of a convincing actual-innocence claim. We have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence. Herrera v. Collins, 506 U.S. 390, 404-405, 113 S.Ct. 853 (1993). We have recognized, however, that a prisoner otherwise subject to defense of abusive or successive use of the writ [of habeas corpus] may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence. Id. at 404, 113 S.Ct. 853 (citing Sawyer v. Whitley, 505 U.S. 333, 112 S.Ct. 2514 (1992)). See also Murray v. Carrier, 477 U.S. 478, 496, 106 S.Ct. 2639 (1986) [We think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." See also McQuiggin v. Perkins, 133 S.Ct. 1924, 1931 (May 28, 2013)].

Petitioner as the afore mentioned stated, the evidence presented from the complainant does not show proof beyond a reasonable doubt, and the Petitioner argues that in a sexual offense there should be a freestanding actual innocence remedy because, in Texas, only a single uncorroborated testimony is sufficient to sustain a conviction. See Tex. Code Crim. Proc. art. 38.07. In Petitioner's situation, the jury's verdict of whether he is guilty of a sexual assault depends almost entirely on whose version of the facts the jury will believe.

Nevertheless, is the Petitioner's case a good candidate to use as an example in order to set a new standard of a freestanding actual innocence remedy for federal habeas relief, and finally

resolve whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence? Finally, a freestanding actual innocence claim, based on testimonial evidence induced at trial, as a federal habeas remedy does not offend the United States Constitution; and therefore, Petitioner seeks relief in a reversal through a new standard set by this Honorable Court.

QUESTION THREE: "Whether if, when the record clearly indicates the need of adversarial expert testimony, will Petitioner's claim regarding trial counsel's failure to investigate and present expert testimony overcome conclusory doctrine law to warrant habeas relief?"

As the above facts has previously stated and the nature of the evidence, additional fact evidence was submitted for proof of the alleged charge via expert analyst which, in its science, would have been a highly debatable issue had trial counsel investigated and requested medical and memory expert testimony.

MEDICAL TESTIMONY

The Sane's report proves the complainant's vagina and anus had no physical signs of trauma, scarring, 3 RR 328-54 and no bleeding, (Sane's report pg. 4). Even the Sane's diagram depicting the female anatomy (diagram G Id pg. 3), shows the Sane nurse's notes revealing SB's genitalia within normal limits, thick smooth edge hymen.

Medical expert testimony would have revealed that (1), any penetration done to SB would damage the hymen, especially of

an 5-6 year old child, (2) the smooth edge hymen indicates no sexual contact/abuse at all. Trial counsel made no investigation into these alternate reasoning other than the State's theory which was testified as consistent with sexual abuse. The above facts and evidence deduced at trial affords no presumption of reasonable trial strategy.

MEMORY EXPERT TESTIMONY

In a memory study, by Mark L. Howe, it reveals that autobiographical memories are later reinterpreted in terms of our current needs, wants and wishes, and complainants reinterpret ostensibly innocent events in terms of their current beliefs that they were abused as children. Id. at 579. Of course, the scientific literature suggests that dreams and some forms of counseling can and will lead one to believe that events experienced during these times of altered consciousness are infact real. Id. at 581. Further, throughout Howe's entire article he comments that during a person's stressful and traumatic event, their memories are very accurate, including false ones, not only for control details (what happened); but also for seemingly peripheral or tangential information (what people were wearing and exact conversations). Id.

In another memory study, completed by Care Laney and Elizabeth F. Loftus, they found that true and false memories were statistically indistinguishable on most measures of emotionality, and not usefully difference (i.e. different in a way that would allow one to tell whether a particular memory was true or false

on any measures. See recent advances in false memory research by Laney and Elizabeth F. Loftus, South African journal of psychology, 43(2) at page 141 (2003). In other words, emotion is not a useful indicator of memory truth. Id. Finally, the memory study traditionally found that false violent memories were easy to plant, with approximately twice as many participants taking on false memories for perpetrating aggressive acts as for being a victim. Id. at 141-142.

There are several facts in Petitioner's case, that would lead a competent counsel to conduct further investigations that indicates the complainant's testimony could have been induced by false memories. First, the indictment alleges sexual abuse to have occurred in 2005-2006 as the complainant testified, but she could not remember what happened, 3 RR pg. 137. SB testified then nothing happened in 2005-2006, Id. pg. 115, but when she was 8 years old Id. pg. 133. SB also told her mother that nothing had occurred before she was eight years old. 3 RR 217, and SB alleged events which were impossible because she was away from Petitioner in England. Id. 252, 253.

Second, the complainant testified that the Petitioner penetrated both her vagina and anus. Nevertheless, the Sane report noted that SB's hymen was "smooth edged" and undamaged. This indicates that the complainant is still a virgin, and that no abuse actually occurred. Had counsel properly investigated and presented the evidence as explained above to the jury, there is a reasonable probability that the outcome would have been different.

ARGUMENT AND AUTHORITY

The 6th amendment evisions counsels playing a crucial role in the adversarial system to produce good results Strickland 466 U.S. 668, 685, 104 S.Ct. 2052 (1984), and counsel's duty is to subject the evidence presented at trial through adversarial testing.Id. The benchmark for judging any claim of ineffective assistance must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced just results.Id at 686.

The Strickland court also dictates that counsels have a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. Id at 691. See also Wiggins v. Smith 539 U.S. 510, 521-22, 123 S.Ct.2526 (2003).

The question for review centers around whether the above record evidence can overcome the conclusory doctrine law to warrant habeas relief?

The Black's Law Dictionary definition of conclusory is.....

*Expressing a factual inference without stating the underlying facts on which the inference is based.....

This is the crux of Petitioner's contentions here because the Eastern District Court concluded that the above evidence cited and its references to the record, were not enough to overcome the conclusory doctrine law. Eastern District Court opinion page 8-12. This conclusory doctrine seems to prevail over cases as this where the Petitioner cites record support, but that evidence is not afforded unto Petitioner's as proof, and our

claims are defined as conclusory, not warranting habeas relief. E.g., Bigby v. Stephens 595 Fed. Appx. 350, cert. denied 135 S.Ct. 2359. (where Petitioner alleged ineffective assistance of trial counsel during voir dire, but claim held conclusory, stating that Petitioner provided no specific explanation as to how), Parson v. Beto N.D. Tex. 2001 463 F.2d 249 (were habeas corpus Petitioner made merely conclusory allegations of denied of effective assistance of counsel at trial, court did not err in dismissal); Rosales v. Cockrell 220 F.Supp. 2d 593 cert. den. 123 S.Ct. 2639, 539 U.S. 960, 156 Led 2d 660 Rh den. 124 S.Ct. 41, 539 U.S. 984, 156 Led 2d 699)(Same); S.D. Tx. 2001 Rose v. Johnson 141 F. Supp. 2d 661; W.D. Tx. 1998, Cardova v. Johnson 993 F. Supp. 573 (Same).

Petitioner asks in request for this Court's supervisory power's, that when a State prisoner presents his habeas claims for relief, shows the reviewing court evidence, as contained in the record, how can habeas relief be granted when our evidence is concluded mere conclusory? How does the 14th amendment apply to us in this setting, or how can justice win when mere definitions preclude every advance of protection? In this Petitioner requests review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

Brian C. [Signature]

Date: 1-5-18