

No.

IN THE

Supreme Court of the United States

DENNIS C. DAVIS
Petitioner

v.

THE STATE OF TEXAS
Respondent

On Petition For Writ Of Certiorari
To The TEXAS COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

Dennis C. Davis
Petitioner
Lynaugh Unit #1597434
1098 S.Hwy 2037
FT. Stockton, TX 79735

QUESTION(S) PRESENTED

WR-76,716-02 Habeas Court did not conduct evidentiary hearings, pursuant to State Court's "Action Taken" remands under State post-conviction procedures. Did the results thereby deprivation of Fundamental and or Constitutional Rights on an Ineffective Assistance of Counsel Claims, Where there are mixed questions of law and fact?

WR-76,716-03, Was the State's Court's "presumption of correctness" afforded to an jurisdictional enhancement (defect) claim. Where the Petitioner sentence excess the maxium punishment, where the trial counsel neglected to answer the Court's order on the issue, where the trial (habeas) court never made any law and fact findings. Thus, no adjudication on merit, that is effectively suspending the writ. Where "presumption of correctness" can apply only to findigns that were in fact made. Question: Did the petitioner have a fair and full hearing on his State writ of habeas corpus.

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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APPLICANT: DENNIS DAVIS

APPLICATION NO. WR-76,716-03

APPLICATION FOR 11.07 WRIT OF HABEAS CORPUS

ACTION TAKEN

DENIED WITHOUT WRITTEN ORDER ON FINDINGS OF TRIAL COURT
WITHOUT HEARING.

Elsa Alcala

JUDGE

Nov. 8, 2017

DATE

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TABLE OF AUTHORITIES CITED

CASES

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| 6.) <u>U.S. V. OLANO</u> , 113 S.Ct. 1770 (1993) | 2. |

STATUTES AND RULES

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| 1.) TEXAS PENAL CODE ANN.. STATUTE § 25.07 | 4., 5. |
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OTHER

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| 1.) 28 U.S.C. § 2243 | 2. |
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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 _____ to the petition and is

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

The opinion of the United States district court appears at Appendix _____ to the petition and is

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

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A. to the petition and is

- ☐ reported at NONE; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the Texas Court of Criminal Appeals court appears at Appendix G. to the petition and is

- ☐ reported at NONE; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

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

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

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

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

☐ For cases from **state courts**: Texas Court of Criminal Appeals

The date on which the highest state court decided my case was 11/08/2017
A copy of that decision appears at Appendix A.

☐ A timely petition for rehearing was thereafter denied on the following date: N/A, and a copy of the order denying rehearing appears at Appendix O.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including -O- (date) on -O- (date) in Application No. ____ A -O-.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

6th Amendment of The Constitution Of The
UNITED STATES

14th Amendment Due Process

TEXAS CODE OF CRIMINAL PROCEDURE 11.07 Sec. 3(d)

TEXAS CODE, FAMILY STATUE 71.004

TEXAS PENAL CODE § 25.07

STATEMENT OF THE CASE

- I. Petitioner was indicted July 31st, 2008 in the District Court Bastrop County, Texas 21st Judicial District.
- II. Petitioner was found to be guilty by jury on May 7th, 2009.
- III. Petitioner Appeal to Texas Court Of Appeals 3rd. District of Austin, Case No. 03-09-00289-CR Affirmed 2/02/2010
- IV. Petitioner filed A Petition For Discretionary review in the Court Of Criminal Appeals Case No. PD-0228-10; Denied 10/27/2010
- V. Petitioner filed Writ of Habeas Application to the Austin Texas Court OF CRIMINAL Appeals 2/09/2017 WRIT: WR-76, 716-02
- VI. Petitioner filed Writ of Habeas Application to the Austin Texas Court OF CRIMINAL APPEALS 3/16/2017 WRIT: WR-76, 716-03
- VII. The Court Of Criminal Appeals remanded both of Petitioner's Applications for further findings. 9/27/2017 Pg. 11 See Attach Pg. 50 more

REASONS FOR GRANTING THE PETITION

CAUSE NOS. WR-76,716-02 & 716-03

The Petitioner's two (2) habeas proceedings and adjudications that is so patently incorrect as to be "Wholly UN-REASONABLE AND UN-RELIABLE", Where the habeas court did NOT ASSESS the merits that were so obviously hurtful, that it does require relief in order to preserve judicial justice.

The Nature and Number of unsupported findings and conclusions has so far departed from the accepted and usual course of judicial proceedings, without reaching the Petitioner's underlying Constitutional Claims in violation of DUE PROCESS 6th, 14th, ARTICLE 1, §19 TEXAS CONSTITUTION AND THE 6th AND 14th Amendments clauses intended to guarantee adequate and appropriated procedural standards. That the State trial court and Texas Court of Criminal Appeals are depriving the petitioner a Full and Fair habeas corpus proceeding on the Petitioner's Applications for writ of habeas corpus submitted under Texas Code of Crim. Proc. Art. 11.07.

Where one entitled to a writ of habeas corpus makes proper Application, said Application(s) conforming to all statutory requirements and probable cause shown, the writ of habeas cannot be denied, for it then becomes a Constitutional Right. CLARK V. STATE, 118 TEX. CRIM. 404, 407, 39 S.W. 2d 39,41 (1931)

WR-76,716-03: ILLEGAL SENTENCE (Enhancement Indictment Void) Claim.

THERE WAS NO STATE (Habeas) COURT'S FINDINGS. A presumption of correctness can Apply ONLY to findings that were in fact made.

ARMSTEAD V. SCOTT, 37 3d 202,208-09 (5th Cir. 1994) See: 28 U.S.C. § 2254(d)(1)&(8) The TEXAS COURT OF CRIMINAL APPEALS merely adopted the habeas court's findings as true and dispositive Petitioner "JURISDICTIONAL DEFAULT ALLEGATION". When in FACT; the habeas court NEVER made a factual findings on the issue. Thus, NO ADJUDICATION ON MERITS. THEREFORE: NOT A STATE'S SATISFY EXHAUSTIVE REMEDY. PERILLO V. JOHNSON, 79 F.3d 441 (5th Cir. 1996).

This presumption of correctness has imposed harm, where there is PLAIN ERROR, U.S. V. OLANO 113 S.Ct. 1770 (1993) raised in the Petitioner's Application for writ of habeas corpus that affected the outcome of the trial proceeding, where on the FACE of the Record that was used in the punishment stage of trial for enhancement purposes, there is a Jurisdictional Defect, which statutorily forbids the State's uses of the conviction to enhance the punishment. The Trial Court imposed a sentence that exceeds the Statutory maximum allowed by Legislative Law for the tried offense.

In this situation the Petitioner is entitled to a Full and Fair habeas proceeding on that Application and the Texas Court of Last Resort is effectively suspending the writ by depriving the Petitioner of 28 U.S.C. sec. 2243 Issuance of writ; return; hearing; decision.

AGUMENTATION: On Appeal WR-76,716-03 the Petitioner contended the one conviction used to enhanced Petitioner's sentence was VOID to a fundamental defect and subject to collateral attack. Petitioner's disposition claims the BELL COUNTY, TEXAS CAUSE

NO. 50,014 used in the Enhancement Paragraph, within Petitioner's instant indictment, is legally and factually insufficient to establish an offense in that instant. Appendix B

The TEXAS COURT OF CRIMINAL APPEALS received the Petitioner's TWO (2) habeas applications and order them set for submissions and evidentiary hearings. After finding the two trial court's initial findings of fact and conclusions of law "INSUFFICIENT" the Court directed the trial court to conduct evidentiary hearings and further development of facts pertinent to Petitioner's case(s).

Appendix C HOWEVER: THE TRIAL(Habeas) COURT DID NOT CONDUCT EVIDENTIARY HEARINGS PURSUANT TO "ACTION TAKEN" REMANDS UNDER STATE POST-CONVICTIONS PROCEDURES. Appendix D. Petitioner was DENIED ARGUMENT, [Where Ineffective Assistance of Counsel, there are mixed questions of law and facts, are not entitled to the presumption of correctness] KOCH V. PUCKETT, 907 F.2d 524 (5th Cir. 1990) [The habeas court having failed to follow the directions on remand (Appendix D.) the judgment should be vacated and the cause once again remanded for compliance with the State Court's earlier mandate.]

On initial and First Supplemental remands the State Trial (Habeas) Court Willfully Decline/Disregard to follow the State's Appellate Court "ORDER" for Evidentiary Hearings. Appendix E. Petitioner was indigent without habeas counsel. However, Petitioner steadfast that the enhancement indictment was invalidated on it's face that cause Petitioner an Illegal Sentence.

The State Trial (Habeas) Court was to conduct evidentiary

hearings, findings of fact and conclusions of law on Petitioner claim that the trial counsel was ineffective, STRICKLAND V. WASHINGTON, 104 S.Ct. 2052 (1984) for allegedly failing to investigate the validity of prior conviction and to object to their use for enhancement, as facts alleged by Petitioner might entitle him relief, if true.

The Petitioner contended to constitute an indictment, as would provide the (BELL COUNTY TEXAS COURT, CAUSE 50,014) with jurisdiction, the charging instrument must charge - the commission of an offense. Tex. Const. Art. V § 12(b); TEX. CODE CRIM. PROC. ART. 21.01

Here the enhancement indictment (CAUSE 50,014) that is fundamentally defective for failing to allege a culpable mental state, does not allege any offense against the law and is utterly insufficient to invoke jurisdiction of trial court and any conviction obtained there under is void.

Under Article 11.07 of the Texas Code of Criminal Procedure, post-conviction habeas relief is available for claims involving jurisdictional defects and violations of fundamental or constitutional right. Where claim of an illegal sentence is cognizable on a writ of habeas corpus. The Record Affirmatively reflects that the enhancement is itself improper. Appendix B

Petitioner "Enhancement Indictment" (Bell County Cause 50,014) Appendix B Charging Petitioner with "violation of Protective Order", Tex. Penal Code Ann. § 25.07 alleging that Petitioner "Knowingly and Intentionally" committed an act of family violence, without alleging that Petitioner "Knowingly and Intentionally"

violated the protective order, FAILED to alleged essential culpable-mental-state elements of the offense. The § 25.07 Statute specifics the culpability requirement that a person act "Knowingly or Intentionally" in committing the Act by which the protective order is violated. Therefore, Tex. Penal Code Ann. § 6.02 must be considered and applied. IT WAS NOT DONE HERE.

ABUSE OF DISCRETION: The Trial (habeas) Court's findings for WRIT 03, has used a duplicitous copy of the trial counsel's Affidavit and a duplicitous findings and conclusions from the other WRIT 02:WR-76,716-02. TO MASK, to deceive and mislead the State Court, that a properly development of the facts and adequate consideration was given to their recommendation. When IN FACT: There is NO trial counsel's order response, NO facts, NO explaintory to counsel's strategic decision(s) and/or actions, within any extent of trial counsel's Affidavit for WRIT 03.

(Appendix F) Moreover, There is NO FINDINGS AND CONCLUSIONS for WRIT 03 within the trial (habeas) court's findings and conclusions. (Appendix E) Therefore, the habeas court never made a factual finding on the issue. A presumption of correctness can Apply ONLY to findings that were in fact made. CLEAR ERROR, ARMSTEAD AT 208-09. HERE, there is a claim of ineffective assistance of counsel, there are mixed questions of law and fact, Evidentiary Hearing is proper. However, Petitioner was denied of "Action Taken" Remand for Evidentiary Hearings. (Appendix D)

INEFFECTIVE ASSISTANCE OF COUNSEL: Trial Counsel did NOT INVESTIGATE THE validity of the Enhancement Indictment, Whereto was invalidated. Petitioner would not had pled true and would

have insisted not to used, where there was no other available enhancements. SUCH, Trial Counsel's conduct constituted deficient performance. STRICKLAND, 6th Amend.

PREJUDICE: Where to a range of punishment of 2-20 years. Not of, a 2-10 years range of punishment. Where Petitioner was sentence a 20 years ILLEGAL SENTENCE that exceeds the statutory maximum allowed by Legislative Law for the tried offense.

INCONCLUSION: STATE COURT, Factual determination is NOT fairly supported by the record. STATE COURT, Has Not Allowed Petitioner A Full And FAIR HEARING. STATE COURT, failure issuance of writ; return; hearing; decision. STATE COURT, Denied Petitioner habeas petition without reaching the Petitioner's properly raised underlying Constitutional Claim. STATE COURT, Prejudice Petitioner.

PRAYER

Petitioner, truly prays that this Court would allow a Discretionary Review on the Un-Adjudicated claims of legal significance and vacated the judgment and the cause(s) once again remand for compliance with the State Court's earlier mandate.

Respectfully submitted,

Dennis C. Davis 2/01/18
Dennis Davis
Petitioner Pro Se

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Dennis C. Davis

Date: 2-1-2018