No. 00-5983 ORIGINAL

In the
SUPREME COURT OF THE UNITED STATES

October Term, 2000

Supreme Court, U.S.
FILED
AUG 30 2000
CLERK

In re: Shelly Walton,
Petitioner

-versus-

N. Burl Cain, Warden,
Louisiana State Penitentiary,
Respondent

PETITION FOR A WRIT OF HABEAS CORPUS

Respectfully submitted:

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Louisiana State Penitentiary
Angola, Louisiana 70712

QUESTIONS PRESENTED

1. Does the jury instruction on reasonable doubt rendered unconstitutional in **Cage v. Louisiana** amount to a new rule of constitutional law that is to be applied retroactively under this Court's holding in **Teague v. Lane**?

2. Or did the congressional enactment of the Antiterrorism Effective Death Penalty Act (AEDPA) amend **28 U.S.C. § 2244** so as to nullify the **Teague v. Lane** standard of retroactivity on collateral review?

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2. Or did the congressional enactment of the Antiterrorism Effective Death Penalty Act (AEDPA) amend 28 U.S.C. § 2244 so as to nullify the Teague v. Lane standard of retroactivity on collateral review? i

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1. The burden of proof is the principal protection against a miscarriage of justice. 9
2. An error in a proceeding that lead to conviction and sentence to LIFE IMPRISONMENT at hard labor and without parole on less than proof beyond a reasonable doubt is subject to collateral review. 12
3. The Fifth Circuit panel in Humphrey correctly concluded that Teague does not bar application of Cage, because a

Cage error undermines the accuracy of the outcome and results in fundamental unfairness. 14

4. Sullivan strongly suggests the retroactivity of Cage. 16

5. The instruction given at Shelly Walton's trial diminished the burden of proof and denied him Due Process. . . 17

6. Even the State must concedes that the instruction in this case erroneously defined reasonable doubt in three places. 18

7. As the Fifth Circuit panel in Humphrey correctly concluded, reading the instruction as a whole confirms the likelihood that the jurors miscomprehended the degree of doubt necessary to acquit. 20

8. The instruction in this case contained all three of the definitions found in Cage to deny due process. . . 21

9. The remainder of the instruction compounds the risks to an innocent defendant. 25

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PETITION FOR A WRIT OF HABEAS CORPUS

Petitioner Shelly Walton, with respect, petitions this Honorable Court for a writ of habeas corpus in his case, as follows:

OPINIONS BELOW

The denial of petitioner's request to file a second or successive application for a writ of habeas corpus by the United States Court of Appeals for the Fifth Circuit is reproduced in the Appendix as A1.

STATEMENT OF JURISDICTION

A petition for a second or successive application for a writ of habeas corpus was denied by the Fifth Circuit Court of Appeals

on June 26, 2000. Such a denial is not appealable nor may it serve as the basis of a petition for a writ of certiorari to this Honorable Court. Consequently, petitioner now invokes the original jurisdiction of this court pursuant to **28 U.S.C. § 2254, U.S. S.Ct. Rule 20.4.b.**, and this Court's opinion in ***Felker v. Turpin***, ___ U.S. ___, 116 S.Ct. 2333 (1996).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

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

The Sixth Amendment to the United States Constitution, provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .

The Fourteenth Amendment to the United States Constitution, provides, in pertinent part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

Title 28, United States Code, Section 2244 provides, in pertinent part:

(B)(2) a claim presented in a second or successive habeas

STATEMENT OF THE CASE

A. State court proceedings

The petitioner in this matter and another young man, Richard Dozier, were charged by grand jury indictment with the March 3, 1987, second degree murder of Gerald Harvey (R. 1). Following the denial of their motions to suppress the identification and evidence (R.15,69-96), they proceeded to trial by jury on June 29, 1987 (R.18-9). Richard Dozier was found guilty of the lesser charge of manslaughter, and Petitioner was found guilty as charged (R.18-9). They both filed motions for new trial and judgment of acquittal; however, the motions were denied (R. 38). Richard Dozier was sentenced to fourteen years at hard labor and his motion for appeal was granted (R. 40,44). Petitioner was sentenced to life imprisonment without benefit of parole, probation or suspension of sentence. His attorney was allowed to withdraw and his motion for appeal was granted as an indigent (R.39,45,48). The Louisiana Fourth Circuit Court of Appeal reversed Richard Dozier's conviction because of insufficient evidence. However, it affirmed the conviction and sentence of Petitioner. **State v. Dozier**, (No. 88-KA-1972) 553 So.2d 911 (La. App. 4 Cir. 1989).

Petitioner has since filed three separate applications for post-conviction relief. He claimed in his first application that his trial counsel was ineffective for failing to investigate and discover favorable evidence that supported the theory of his case. This application was denied by the trial court on November 15, 1995. Petitioner claimed in his second application that the trial court gave an unconstitutional charge to the jury concerning reasonable doubt. Petitioner's second application was denied by the trial court on November 20, 1997. Petitioner re-urged this claim (the unconstitutional charge to the jury concerning reasonable doubt) in his third application, arguing that a new interpretation of law surrounding the question of retroactivity as justification for raising it again. The trial court denied relief, stating: "Shelly Walton, defendant, filed application for post conviction relief, which the court denied, this date." Petitioner filed an application for writs into the Louisiana Fourth Circuit Court of Appeal. The Court of Appeals denied petitioner's writ-application on September 10, 1999, stating that petitioner had "failed to carry his burden of proof that the claim [he raised] [wa]s reviewable and the relief should be granted." Petitioner thereafter applied to the Louisiana Supreme Court for writs. That

court denied petitioner's application on April 28, 2000, citing **La. C.Cr.P. Art 930.8** and **State v. Penns**, 99-2916 (La. 12/16/99), ____ So.2d ____.

B. Federal court proceedings

Upon exhausting state court remedies, petitioner sought permission from the Fifth Circuit to file a second or successive application for a writ of habeas corpus, under the provisions outlined in **§ 2244 (b) (2)**.[1] His request was based on this court's ruling in **Sullivan v. Louisiana**, 508 U.S. 275 (1993), as interpreted by the Fifth Circuit in **Humphrey v. Cain**, 138 F. 2d 552 (5th Cir. 1998)(en banc), that a **Cage** violation (a faulty instruction to the jury on reasonable doubt) was to be applied retroactively to cases on collateral review. The Fifth Circuit denied petitioner's request on June 26, 2000, concluding that petitioner had failed to make a showing that a **Cage** violation is to be applied retroactively to cases that fall under the purview of the AEDPA. Apparently, this conclusion is based on the rational of

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[1]As the appendix demonstrates, petitioner previously sought habeas corpus relief in federal court by raising a claim of insufficient evidence immediately following the completion of his direct appeal process.

that court's holding in ***In re Smith***, 142 F. 3d 832, 835-36 (5th Cir. 1998) (that the AEDPA negated the retroactivity doctrine announced in **Teague v. Lane**, 489 U.S. 288 (1989)).

SUMMARY OF THE ARGUMENT

The Fifth Circuit's holding that the AEDPA negates this court's retroactivity doctrine is erroneous and in direct conflict with a decision from the Ninth Circuit, **Nevius v. Sumner**, 105 F. 3d 453 (9th Cir. 1996), which deals with the same issue surrounding the retroactive application of a **Cage** reasonable doubt jury instruction. The Fifth Circuit has chosen to follow the decision of the First Circuit in **Rodriguez v. Superintendent, Bay State Correctional Center**, 139 F. Ed 270 (1st Cir. 1998), which explicitly rejected the Ninth Circuit's holding in **Nevius**. As in **Nevius**, however, petitioner contends that **28 U.S.C. § 2244(b)(2)(a)** authorizes him to raise his claim in a second federal habeas petition because he has made the necessary showing that it "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." See **Adams v. Evatt**, ___ U.S. ___, 114 S.Ct. 1365, 128 L.Ed. 2d 42 (1994), where this court vacated a decision of the

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-30682

U.S. COURT OF APPEALS
FILED
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CHARLES R. FULBRUGE III
CLERK

IN RE: SHELLY WALTON,

Movant.

Motion for an order authorizing
the United States District Court for the Eastern
District of Louisiana to consider
a successive 28 U.S.C. § 2254 petition

Before JOLLY, DAVIS, and BENAVIDES, Circuit Judges.

BY THE COURT:

Shelly Walton, Louisiana prisoner # 124399, seeks authorization to file a successive 28 U.S.C. § 2254 petition. Relying on Humphrey v. Cain, 138 F.3d 552 (5th Cir. 1998)(en banc), a decision rendered by this court after his first habeas petition was denied, and Cage v. Louisiana, 498 U.S. 39, 40-41 (1990) and Victor v. Nebraska, 511 U.S. 1 (1994), Walton argues that his claim is based on a new rule of constitutional law made retroactive by the Supreme Court that was previously unavailable.

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a second or successive 28 U.S.C. § 2254 petition must be certified by this court to contain either newly discovered evidence or a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was

previously unavailable. § 2244(b)(2)(A),(B). Walton has not met this standard. His motion for authorization to file a successive habeas petition is DENIED.

MOTION DENIED.