

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD DELAIN KYLES - PETITIONER

vs.

LORIE DAVIS, Director - RESPONDENT

----- * -----

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Prepared by

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QUESTIONS PRESENTED

The Court of Appeals has adopted and applied a "Fifth Circuit Principle" that "changes in the discretionary rules affecting parole suitability cannot violate the **ex post facto clause**". A principle cited and applied in State and Federal courts within the Fifth circuit; Which has led to the Fifth Circuit Court (itself) issuing conflicting legal and evidentiary review standards on identical question for review. The First and Second Questions presented for review are:

1st) Did the Fifth Circuit err by applying a "circuit principle" that "rules affecting eligibility may violate the [ex post facto] clause but discretionary rules affecting suitability do not"; (i.e., in light of "Principle" announced in GARNER v. JONES, 120 S.Ct 1362,1369-70) ?

2nd) Did the Fifth Circuit err by different panels imposing two different legal and evidentiary standards on identical questions presented for review; (i.e., where two previous panels demanded concise evidence of Parole Board Member Designation based upon Texas Parole statute or Board Policy; And a third Panel demanded evidence of "randomly selected panel" not a part of Texas Parole Statutes or Board's Policy/practices) ?

Petitioner was convicted under a 1965-1975 Texas Parole Board 3-Member suitability determination statute. He has committed no acts during his 43½ years of incarceration to warrant a change in his legal status. Texas Board of Pardons and Paroles conducted

QUESTIONS PRESENTED cont'd.

his 2013 review process under a retroactive 1993-2004 statute which was also replaced by another statute in 2005. The 2005 Version (a) removed Petitioner's offense from the Face of the statute to eliminate parolability; and (b) its subsections specifically instructs: "an offense committed before the effective date of This ACT is covered by the Law in effect when the offense was committed". Petitioner achieved the parole suitability requirements imposed under his offense date statute during his 2013 review process. The Third and Fourth Questions presented are:

3rd) Did the Fifth Circuit err in failing to conduct "**de novo review**" of **COA Briefed Issue** that retroactive statute had been repealed and rendered inapplicable to Petitioner's 1975 offense ?

4th) Did the Fifth Circuit err in declaring **ex post facto** violation did not occur when the Board used retroactive statute to prolong prison stay by denying prisoner parole suitability achievement under statutory requirements in effect on his offense date; Where prisoner can show under implementation of "new rule" by the Board's (own) "Member's designation Policy" he would have achieved parole suitability had his offense date rule been applied; (i.e., Where prisoner - under facts particular to his case - made objective evidentiary showing of lesser period of incarceration utilizing analytical tools instructed by GARNER, 120 S.Ct. @ 1369-70)?

PARTIES

Petitioner, - Richard Delain Kyles is a prisoner in custody of the Texas Department of Criminal Justice - Institutional Division (or TDCJ-ID); located at the Ramsey Prison Unit, 1100 FM 655, Rosharon, Texas 77583; Within the Angleton Regional Office area of the Texas Board of Pardons and Paroles (TDCJ-PD).

Respondent, Lorie Davis is the Director of TDCJ-ID, Headquartered at P.O. Box 99, Huntsville, Texas 77340.

¹ A un-named entity of interest is the Texas Board of Pardons and Paroles, chaired by David Gutierrez Head-quartered at P.O. Box 13401, Austin, Teaxs 78711-3401.

1. Any person (prisoner or citizen) of the United States that may be arbitrarily subjected to burdens of a repealed statute by a State Agency exercising discretion is a potential party of interest in this case.

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PETITION FOR WRIT OF CERTIORARI

Richard DeLain Kyles, on behalf of himself and all citizens of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in Kyles v. Davis, No 15-20363 (Clement, Costa and Willet, JJ.)..

OPINIONS BELOW

The Decision of the United States Court of Appeals for the Fifth Circuit is unreported; A copy is attached as APPENDIX A to this Petition (A.1). The Order of the United States District Court for the Southern District of Texas is not reported. A copy is attached as APPENDIX B to this Petition (B.1).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered May 16, 2018. Petitioner received the Decision by Mailed on May 22, 2018 and filed timely "PETITION FOR REHEARING EN BANC" on May 29, 2018. .

The United States Court of Appeals entered an ORDER denying Rehearing on July 16, 2018. A copy of the ORDER appears in APPENDIX C to this Petition (C.1). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Tex. Gov't Code § 508.046 (2004) initially codified as **Art.42.18 Tex. Code Crim. Proc. (1993)**. **SECTION 2, Subsection (g) of Section 7.** "The Board may grant parole to a person convicted of a capital felony ... only on a two-thirds votes of the entire [7-person] membership of the Board" [Initially 18 members in 1993].

SECTION 5. "The change in law made by **SECTION 2** of This ACT to **Subsection (g) SECTION 7, Article 42.18 Code of Criminal Procedure**, applies to a defendant convicted of an offense committed before, on or after the effective date of this ACT [Sept 1, 1993]" ..

Tex. Gov't Code §508.046 (2005) "To release on parole an inmate who was convicted of an offense under Section 20A.03, 21.02, 21.11 (a)(1) or 22.021 Penal Code.. on parole all Board Members must vote on the release on parole... and at least two-thirds members must vote in favor of release..

SECTION 17 ACTS ch.787

(a) The change in law made by this ACT applies only to an offense committed on or after the effective date of this ACT. **(b)** An offense committed before the effective date of this ACT is covered by the law in effect when the offense was committed and the former law is continued in effect for that purpose". [eff. Sept 1, 2005].

STATEMENT OF THE CASE

Petitioner seeks federal habeas relief based on claims his rights under the United States Constitution's ex post facto clause were violated. He was convicted January 1975 of a serious totally unplanned capital murder; And sentenced to "one life term" with parole suitability determination reviewable under **Article 42 .12 Sec(s) 12-15 Tex. Code Crim. Proc., (1965-75)**. This statute imposed that "all prisoners" of Texas acquire "two favorable majority votes of the [then, only] three Board Members with approval of the Governor. A 1981 Texas Voters Constitutional Referendum removed the Governor's involvement with the parole review proces. The Governor has never once been involved with any of

Petitioner's reviews.

Petitioner's initial 1984 and subsequent five (5) reviews were conducted by a Board designated 3-member region Panel comprised of Board Members; Or a Board Member and two Commissioners at the Regional Office area wherein he was confined. In 1991 the Board begin re-subjecting Petitioner to Regional three (3) Board Member (only) review processes. In 2013 the Board conducted his review under **§508.046 Tex. Gov't Code (1993-2004)**; A retroactive statute that classifies his offense for a FULL BOARD MEMBERS (ONLY) REVIEW: That imposes an increased "Extraordinary Majority of five (5) out of seven (7)" favorable votes ; Where Board Member only voting is conducted as designated by **BOARD DIRECTIVE BPP-DIR. 145.301 Extraordinary Vote (S.B. 45 Voting Order)**.

BPP-Dir. 145.301 in pertinent part duplicates and continues the Board's "Members (only) designation as authorized under Petitioner's offense date statute: **Art. 42.12 Tex. Code crim. Proc. (1965-75)**. According to "practical implementation" of **BPP-Dir 145.301**, the Board's (own) Designation Policy objectively showing "who actually would have been" and "who actually were" designated by the Board under either the old or new review process: Petitioner acquired the favorable majority votes of the initial three(3) Board designated members during his 2013 review to satisfy or achieve statutory release suitability requirements in effect on his offense date. **BOARD DIRECTIVE BPP-DIR 145.301:**

***BPP-Dir 145.301 VOTING ORDER-** Board Offices shall initiate the voting process for offenders requiring a full Board vote based on offender's location in facilities under their

jurisdiction. The Voting order for each office, after initiating an extraordinary vote is as follows;

ANGLETON BOARD OFFICE: Angleton, San Antonio, Amarillo, Gatesville, Palestine, Huntsville and Austin".

Please see **APPENDIX E** attached to this Petition (**E.1-5**). As one can objectively ascertain from the **BPP-Dir 145.301** Scheduling Order the Board Member only Voting Process begins in the Board's Regional Office where prisoner is confined; Which in this Petitioner's case is the Angleton Region.

Two (or three) previous Panels at the Fifth Circuit Court of Appeals reviewed identical *ex post facto* questions and imposed an objectively clear and concise evidentiary standard in form of "Board Members designation Statute or Policy". Eight years later Petitioner acquires and presents the demanded evidence. Now, the Current Fifth Circuit Panel imposes a new, different, totally speculative and impossibly achievable evidentiary standard of showing "who would have served on a randomly selected three member panel" which does not and has never exist under Texas Statute or Board policy/Practice.

REASONS FOR GRANTING THE PETITION

I. CONFLICTS WITHIN THE FIFTH CIRCUIT'S DECISIONS;

**CONFLICTS WITH THE SUPREME COURT DECISIONS AS
ADOPTED BY OTHER FEDERAL COURTS OF APPEALS.**

A) There are conflicting decisions within the Fifth Circuit concerning identical *ex post facto* question, presented for review.

Two previous Fifth Circuit Panels conducted identical comparative implementation analysis of old and new statutes during the parole review process; And imposed identical evidentiary standards; While a third panel introduces a totally new speculative standard. The First Panel:

"Amendment to Texas parole procedure that required two-thirds votes of entire parole board instead of three member panel in order to grant parole did not violate ex post facto clause as applied to state prisoner, even though, prisoner had obtained the votes of Board Members who served in region in which he was incarcerated given absence of evidence that those three persons would have been on a panel appointed by the Board to consider his parole under the former procedure." Kyles v. Quarterman, 291 Fed. App'x @ 614 (see also Vernon's Ann. Texas Government Code, §508.031 (2008-) NOTES OF DECISIONS, p. 511)..

The Second Panel:

"Wallace claims that the meeting minutes he presented to the state court showed that Brenolyn Rogers-Johnson and Sandy Walker, Board members, who had supervisory control over Coffield Unit inmates - voted in favor of Wallace's parole. There is no indication from the state court record however, that Wallace produced evidence that these three Board Members voted on both panels or that they would have been assigned to the later panel if it were a three person panel Wallace v. Quarterman, 516 F.3d @355-56.

The Third Panel:

"Kyles tries to make [significant risk of increased confinement] showing by pointing to the two members of the Parole Board who favored his parole. If those two had been on a three-member panel selected under the old procedure, then he would have had enough votes for parole. The problem is the "if". Kyles can not show that a randomly selected three member panel would have included the two members who voted in his favor". Kyles v. Davis, No.15-20363 (APPENDIX A to this Petition at (A.2-3)).

Third Panel's decision introduces and imposes a speculative standard that "Kyles can not show that a randomly selected three

member panel would have included the two members who voted in his favor". This runs afoul with previous Fifth Circuit Decisions in KYLES and WALLACE which demanded clear and concise evidence objectively demonstrating Board Member designation/appointment Policy to satisfy comparative implementation analysis of GARNER v. JONES, 120 S.Ct. @ 1369-70. "Randomly selected panels" has never been a part of Texas parole statutes or Board Policy and practices.

This Court instructs demonstration of increased period of confinement by comparative practical implementation affects of new and old statutes by the Board during the review process. Evidence must be drawn from comparision, "[Claimant] must demonstrate by evidence drawn from the [new] rules practical implementation by the Agency charged with exercising discretion that its retroactive application will result in a longer period of incarceration than under the earlier rule". Garner @ 1369.

In Kyles 291 Fed. App'x @ 614 and Wallace 516 F.3d @ 355 those Petitioners provided favorable Board voting minutes but previous Fifth Circuit panels held that those Petitioners had failed to provide "Board Members' designation/appointment and Voting Order" evidence. In the instant case, Petitioner has presented undeniably clear and concise evidence in form of Board's (own) Member and Office Designation and Voting Order Scheduling Policy" objectively demonstrating "who actually would have been" and "who actually were" his initial three Board policy designated

B) Conflicts with Decisions of the Supreme Court
and other Courts of Appeals concerning Announ-
ced "Principle on Parole Board's Discretion
and Ex Post Facto Clause Prohibitions".

The Fifth Circuit's "principle and decision" runs counter or afoul with the Supreme Court Principle that "discretion does not displace the ex post facto clause" as announced in GARNER v. JONES, 120 S.Ct. 1362. Since its announcement in 2000 this "Principle" has been adopted beyond just citing but actually put into practice by other federal Courts of Appeals. Fletcher v. Reilly 433 F.3d 867, 875-78 (D.C. Cir 2006) and Micken-Thomas v. Vaugh, 321 F.3d 374 (3rd Cir.2003) are just two examples. The Fifth Circuit's Principle:

"Rules affecting eligibility for parole may violate the [ex post facto] clause, but discretionary rules affecting suitability do not. The rule at issue here [§508.046 Tex Gov't Code] addresses suitability, not eligibility for parole" Wallace v. Quarterman, 516 F.3d @ 354 (5th Cir.2008) (Authoritatively cited in Kyles v. Davis, No. 15-20363 (or this instant case)).

Thus, Clear Circuit pre-conception of "principled dissuasion and conclusive reasoning" that Garner instructed comparative implementation analysis is unachievable but perfunctorily cited.

The Decision states:

"This conjecture about what would have happened under the old system is not enough to establish the likelihood of increased punishment that an ex post facto violation requires" Kyles v. Davis No. 15-20363, p. 3.

This decision announces unachievability of evidentiary standard imposed by the Supreme Court and previous Fifth Circuit Panels.

It forecloses any possible presentation of clear and concise evidence demonstrating actual Board Member designation and Voting Policy. In other federal circuits the Courts of Appeals conduct a straight forward comparative implementation analysis.

The Decision overlooks that significant risk cannot be determined without comparative analysis measuring affects caused by Board's implementation of the new and old statutes. The previous KYLES and WALLACE 5th Circuit Panels imposed evidentiary standard that was plain and specific: Prisoner must provide evidence that favorable voting Board Members "would have been appointed by Board under old and new statute to demonstrate implementation results as required under GARNER. §508.046 Tex Gov't Code exist with increased number of Board Members from only "3" under Petitioner's 1975 offense date to "7" in 2013. Board's BPP-Dir 145.301 is the method of implementation of §508.046 for "board Member only" review processes; which the Board has been subjecting Petitioner to since 1991. According to Board's (own) BOARD MEMBER ONLY VOTING ORDER DESIGANTION POLICY it is objectively clear that the initial "three Board Members in Petitioner's 2013 review "would have been Mr. Davis, Ms Gonzales and Mr Gutirrez (or whomever were representatives of their Offices). There is no other objectively reasonable method in which to determine "who actually would have served on Petitioner's 3-Board Member only Panel other than determining from "factual evidence" of who would have been" designated by the Board's members only Voting-Schedul-

ing Order Policy". Petitioner met GARNER standard of putting on factually substantiating evidence based on results of practical implementation of the retroactive statute by Board's exercise of its' Designation Directive **BPP-Dir I45.301...**

C. The Court of Appeals has veered away from the correct course of judicial appellate proceedings.

Petitioner raised issue of repealed statute by written claim at every stage in courts below; And he "briefed" it in his Application For Certificate of Appealability; His PRINCIPLE and REPLY BRIEFS after Issuance of **COA** by the Fifth Circuit. The Court of Appeals has sanctioned a state court's unreasonable course of refusing to extend a "legal principle" from Supreme Court precedent to a context where it should be applied. Thus, a matter of constitutional interpretation has not received plenary review pursuit to **28 U.S.C. §2253 and §2254.**

The Court of Appeals failed to conduct "de novo review" of the first issue raised and briefed. Petitioner presented the issue: WHETHER EX POST FACTO VIOLATION OCCURRED WHERE RETROACTIVE STATUTE USED TO PROLONG PRISON STAY WAS REPEALED BY LEGISLATURE RENDERING IT INAPPLICABLE TO PETITIONER'S 1975 OFFENSE ? The Supreme Court has been clear on issue of **review(s):**

"Whether a state law is properly characterized as falling under the **ex post facto clause** is a federal question that the Supreme Court determines". Carmell v. Texas, 120 S.Ct. 1620.

On Statutory Language The "Supreme Court" is clear: "[IT]

must presume that the legislature says in a statute what it means and means in statute what it says there" DODD V. UNITED STATES 125 S.Ct. 2478 (see also Hartford Underwriters Inc., Co., 120 S.Ct. 1942) ("We start, as always, with the language of the statute") ("When the statute's language is plain, the sole function of the court, at least, where disposition required by the text is not absurd, is to enforce it according to its terms" DODD @2482).

As clearly shown on page 3 above, **§508.046 Tex. Gov't Code 2005** repealed the **1993-2004** version of the statute. Statutory repeal by implication may not be favored, but, when a new law covers the whole subject matter of former law and prescribes a different penalty, the former law is repealed by implication. New version of the statute itself evinces validity of Petitioner's claim. Here, the latest enactment is clearly intended to embrace all subject matters of "parolability for all offenses stated and to remove capital felonies with which it previously dealt. Thus, repeal of former law in relation to capital offenses. **Section 17** clearly states: "An offense committed before the effective date of this Act is covered by the law in effect when the offense was committed".. In Schriro v. Summerlin, 542 U.S 348 @ 353 (2004) This COURT announced "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes".

The latest (2005) enactment constitutes repealment because it does not contain mere change in phrasology; It makes substantive change on the **Face** of the statute and its **Subsections** on **penal** enforcement by (1) removing the possibility of parole for

capital felonies from the ~~Face~~ of statute, and (2) placing all capital felonies prior to its initial 1993 enactment under the statutory suitability vote requirements in effect on prisoner's offense date in **subsections (a) and (b) of SECTION 17.**

The clear repeal here rendered the statute inapplicable to Petitioner's 2013 review process. Petitioner suffers prolongment of prison stay beyond requirements of his offense date statute due to Board's subjecting him to post-scriptive perfunctory review processes under retroactive application of undeniably repealed statute....

THE FIFTH CIRCUIT'S DECISION IS ERRONEOUS

Operating under a "circuit principled dissuasion" that rules affecting eligibility may violate the [ex post facto] clause but rules affecting suitability do not'; The Court of Appeals (1) did not conduct a "de novo review" of repealed statute used to prolong Petitioner's prison stay. And (2) Disregarded clear factual and concise documented evidence upon which the issuance of COA was granted. 28 U.S.C. §2253 and §2254.

See Wallace, 516 F.3d 2354-55: The Fifth Circuit's reasoning that "the law of this circuit affirms how PORTLEY and MORALES apply to the Texas Code" is plainly erroneous. First, The Court of Appeals simply cites MORALES without any explanation of why the practical affects of the new statute does not create significant risk of increased period of incarceration in Petitioner's case. Second, PORTLEY 444 U.S. @ 132, 100 S.Ct. 714 is not a

IMPORTANCE OF THE QUESTIONS PRESENTED

THIS CASE ISN'T JUST ABOUT PETITIONER'S SITUATION.

Petitioner isn't asking this Supreme Court to exercise its' supervisory powers on a simple mis-evaluation of factual and document evidentiary claim in one prisoner's case. Here, exists specifically briefed yet un-reviewed and unresolvled question as to what constitutes "ex post facto violation relative to usage of un-questionably repealed retroactive statute because a Court of Appeals did not conduct "de novo review". 28 U.S.C. §2253 and §2254. Questions of usage of repealed and retroactive statutes concerns everybody (prisoner and civilian) in this Nation.

There's a Second - equally as important - need for Supreme Court authoritative addressment in this case. The "principle dissuasion" applied by the Fifth Circuit runs counter to the Supreme Court announced Principle and analytical tools applied by other Federal Courts of Appeals. This "circuit principled dissuasion" has led to clearly expressed conflicting opinions within the Fifth Circuit Court of Appeals as to what is the correct method of review and evidentiary standard imposed under identical question of ex post facto violation.

THIS COURT acknowledged the importance of this issue in MORALES, 115 S.Ct. 1597 (1995) and GARNER, 120 S.Ct. 1362 (2000). In MORALES and GARNER This COURT exercised care not to announce a "single formula" to declare what type of "parole legislation" constitutes an ex post facto violation law. This Court wisely

provided an instructive framework for a "claimant" to demonstrate an "ex post facto violation in a context where there are changes in discretionary parole rules", GARNER, @ 1369-70. Petitioner is respectfully asking This Supreme Court to exercise IT'S Supervisory Powers to Order that the Fifth Circuit adopt and practice "Principle and analytical tools" announced in GARNER as adopted and practiced by all other circuit courts of appeals.

Even on the surface, this case isn't just about Petitioner (or other prisoners) whom Texas Parole Board may or may not arbitrarily subject to a "repealed-retroactive statute". The true deeper implications are: When any Agency within any of all the Fifty States can use a repealed statute against any prisoner (or Civilian) of a State; Then a new law enacted by Legislature does not carry force or "says what it means and means what it says"! Left un-checked a State agency can construe discretion as the authority to implement any legislation - when it chooses - inside of prisons (or out in society). This is every body's (prisoners and civilians) case !!!

CONCLUSION

When the Supreme Court announced principle is not court enforced law of the Land;;There is no law in the land. For those reasons certiorari should be granted.

Respectfully,

Richard D. Kyles -Petitioner