No. 18-8645

IN THE SUPREME COURT OF THE UNITED STATES

DAVID DEAN HARRIS - PETITIONER

vs.

LORIE DAVIS - RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

DAVID DEAN HARRIS

TDCJ No. 1911294

2665 Prison Rd. #1

Lovelady, Texas 75851

QUESTIONS PRESENTED

1) WAS THE STATES USE OF THE COMPLAINING WITNESSES NAME SPECIFICALLY AS THE VICTIM A VIOLATION OF PRESUMPTION OF INNOCENCE, SUPREME COURT PRECEDENT, UNITED STATES CONSTITUTIONAL VIOLATION, DUE PROCESS AND SIXTH AMENDMENT VIOLATION?

2) WAS PETITIONERS RIGHT TO COUNSEL VIOLATED WHEN PETITIONER'S ATTORNEY ALLOWED IN EXTRANEOUS OFFENSE EVIDENCE? HE SPECIFICALLY FILED MOTIONS TO KEEP IN VIOLATION STATE STATUTORY LAW 403, UNITED STATES CONSTITUTION 6 AMENDMENT.

3) WAS PETITIONER'S ATTORNEY INEFFECTIVE FOR FAILING TO OBJECT TO THREE WITNESSES WHO DID TESTIFY UNDER 403? BUT OBJECTED TO 403 TO THE ONE WITNESS WHO DID NOT TESTIFY. SUPREME COURT PRECEDENT UNITED STATES CONSTITUTION AMENDMENT 6.

4) WAS PETITIONERS APPEAL ATTORNEY INEFFECTIVE FOR FAILING TO CITE ANY CONTROLLING AUTHORITY ON PETITIONER'S DIRECT APPEAL? IN VIOLATION OF 5TH CIRCUIT PRECEDENT, UNITED STATES CONSTITUTION AMENDMENT 6?

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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 JUDGEMENT BELOW.

OPINIONS BELOW

[X] FOR CASES FROM FEDERAL COURTS:
THE OPINION OF THE UNITED STATES COURT OF APPEALS APPEAR AT APPENDIX A TO THE PETITION IS

[X] IS UNPUBLISHED
THE OPINION OF THE UNITED DISTRICT COURT APPEAR AT APPENDIX B
[ ] TO PETITION AND IS
[X] IS UNPUBLISHED

JURISDICTION

[X] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was October 11, 2018.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: October 19, 2018, and a copy of the order denying rehearing appears at Appendix A .

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

The District Court and Court of Appeals for the Fifth Circuit denied Petitioner's request for Certificate of Appealability. In Hob v. United States, 524 U.S. 236(1998) this Court held that pursuant to 28 U.S.C. § 1254(1) the United States Supreme Court has jurisdiction on Cetiorary, to review a denial of a request for Certificate of Appealability by Circuit Judge or panel of a Court of Appeals.

STATUTORY PROVISION INVOLVED

The right of a state prisoner to seek federal habeas is guaranteed in 28 U.S.C. § 2254. The standard for relief under the "AEDPA" is set forth in 28 U.S.C. § 2254(d)(1).

STANDARD OF REVIEW
DENIAL OF CERTIFICATE OF APPEALABILITY

In Miller-El v. Cockrel, 537 U.S. 322, 123 S.Ct. 1029(2003) this Court clarified the standard for issuance of a Certificate of Appealability(hereafter "COA"), a prisoner seeking a COA need only demonstrate a substantial showing of a Constitutional Right. A prisoner satisfies this standard by showing that a jurist of reason could disagree with the district court's resolution of his Constitutional claim or that jurists could conclude the issues presented are

adequate to deserve encouragement to proceed further.... we do require Petitioner to prove, before the issuance of a COA , that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after COA has been granted and the case has received full consideration that Petitioner will not prevail. Id. 123 S.Ct. at 1034, citing Slack v. McDaniel, 529 U.S. 473, 484(2000).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 5
Amendment 6
Amendment 14

TEXAS CONSTITUTIONS

Articles 1,2,3,10,13,19,29

STATUTORY

Presumption of Innocence 38.03
Neglect of Duty 2.03

SUPREME COURT RULE

Rule 10,14

STATUTORY DIVISION

2254 (D)(1)
28 U.S.C. § 1254(1)

STATEMENT OF THE CASE

Petitioner was convicted of sexual assault of a child in Harris County, Texas and sentenced to Fifty(50) years of incarceration in 2014. The conviction was affirmed on appeal and discretionary review was refused. Harris v. State, 475 S.W.3d 395(Tex.App-Houston [14th Dist.] 2015, pet. ref'd). Petitioner's application for state habeas relief was denied by the Texas Court of Criminal Appeals in 2016. Petitioner filed a 2254 in the Federal District Court of the Southern District, Houston Division. Petitioner appealed to the Fifth Circuit for a COA, the United States Court of Appeals

denied petition on October 11, 2018. A timely petition for rehearing was denied by the United States Court of Appeals on the following date: December 19, 2018.

REASON FOR GRANTING THE PETITION FOR WRIT OF CERTIORARY

SUPREME COURT RULE 10

(a) A UNITED STATES COURT OF APPEALS ENTERED A DECISION IN CONFLICT WITH THE DECISION OF ANOTHER UNITED STATES COURT OF APPEALS ON THE SAME IMPORTANT MATTER; HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH A DECISION BY A STATE COURT OF THE LAST RESORT OR HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, OR SANCTIONED SUCH A DEPARTURE BY A LOWER COURT, AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISOR POWER;

(b) A STATE COURT OF LAST RESORT HAS DECIDED A IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH DECISIONS OF ANOTHER STATE COURT OF LAST RESORT OR OF A UNITED STATES COURT OF APPEALS;

(c) A STATE COURT OR A UNITED STATES COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT OR HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

QUESTION NUMBER ONE

1) WAS THE FEDERAL DISTRICT COURT'S FINDING AND THE FIFTH CIRCUIT COURTS FINDING CONTRARY TO THE SUPREME COURT PRECEDENT IN HOLBROOK V. FLYNN, 475 US 500, 106 S.Ct. 1340, 1348, 89 L.Ed. 525(1986)?

When the State specifically refered to the complaining witness by name, Jessica King as the victim is it in violation of Petitioner's presumption of innocence? U.S. C.A. Due Process as well as the effective assistance of counsel.

Petitioner would ask the Court to exercise it's supervisory power over the lower

Court to protect this fundamental right granted to every American by the founders in the face of the overwhelming power of the State. During the Voir Dire process before any testimony was taken, the prosecutor referred to the complaining witness by name Jessica King as the victim. Petitioners attorney failed to object when the State answered and said they were speaking hypothetically. The record at trial does not support this finding, the voir dire by prosecutor Nelson. See page 85 and 86. Page 85 Line 4 through 8. Venire person: Ten years in past I think all you got is the victim's complaint. I can't imagine what else you would have.

Ms. Nelson: Okay, you are juror no. 62.

Further in discussing the type of evidence the State may possess. The following exchange occured, page 85, Lines 9 through 25.

Venire person: Yes, ma'am.

Ms. Nelson: Yes sir?

Venire person: I fall under testimony, I suppose, but psychiatric evaluation.

Ms. Nelson: Okay evaluation yes, sir.

Venire person: L 16. Possibly clothing they were wearing at the time of the incident.

Ms. Nelson: Possibly clothing they were wearing?

Venire person: It would be....that would be forensics?

Ms. Nelson: Right that would be...

Exchange continues on page 86:

Ms. Nelson: Forensics. Some type of finger prints or D.N.A....I want to go back to what juror No. 8 said. 8 can you say that again for me?

Venire person: Said it just seems with ten years since it was ten years in the past you wouldn't have much more than the complaint from the victim.

Ms. Nelson: The victim right the victim. You have a witness what do you think about that juror No. 9 you have a case, if you have it solely on that witness?

Venire person: Depends on his..... whether his is believable or the evidence.

Ms. Nelson: Depends on whether she is believable, right? Here is my question to you, okay: Happend ten years in the past. We have a victim. Say that's the only thing you have. If you believe that victim beyond a reasonable doubt could you find somebody guilty of aggravated sexual assault of a child. Just based off that one witness? What do you think juror No. 1?

Venire person: Sure.

Ms. Nelson: 2?

From the following exchange Nelson is commenting on the weight of the evidence. A trial judges comment before voir dire to the jury that I think that evidence will probably show that Sara Whitehouse [victim] was killed somewhere during that time....somewhere during that time...were calculated and probably did convey the court opinion in the case on pivotal evidence. Graham v. State, 624 S.W.2d 785(Tex.App.- Forth Worth, 1986 no. pet.). When the prosecutor in Petitioner's case identified the complaining witness in the record(Line 1-5,page 63): Could have the charged victim in this case, the victim is Jessica King. Clearly the record does not reflect the prosecutor was speaking hypothetically as the State contends. Petitioner's attorney was ineffective for failing to object, not protecting his presumption of innocence art. 38.03. Presumption that all persons are presumed innocent and no person may be convicted of an offense unless each element of the offense is proven beyond a reasonable doubt. The fact that he has been arrested, confined or indicted for or otherwise charged with the offense gives no inference of guilt at his trial. A procedural right Petitioner was entitled to that his attorney failed to protect. Petitioner never argued the term victim violated his right to the presumption of innocence. Petitioner argued the specific use of the complaining witnesses name, Jessica King, her word alone the jury could take as evidence. Before the trial during voir dire gave inference of his guilt.

This was a procedural right based on this Courts holding in William v. Taylor, 120 S.Ct. 1495. It also violated Holbrook v. Flynn, 475 U.S. 500, 106 S.Ct. 1340, 1348, 89 L.Ed.2d 525(1986), due process violation. Near the end of the trial Petitioner's attorney did object to the term victim at the end of trial and the court and state agreed to change the language to complaining witness. But that's not the primary objection of this Petitioner. The use of the complaining witnesses name and to this witnesses word are alone without any other evidence being presented was enough to convict the Petitioner and violated his constitutional right to the presumption of innocence and due process.

Petitioner has proven by the record that the State was not speaking hypothetically. The Federal District Court's finding as well as the Fifth Circuit's finding was contrary to Federal law and this Court's holding in the following court cases: Strickland v. Washington, 104 S.Ct. 2052, 2062, 80 L.Ed.2d 674(1984); William v. Taylor, 120 S.Ct. 1495; Holbrook v. Flynn, 475 U.S. 500, 106 S.Ct. 1340, 1348, 89 L.Ed.2d 525(1986). The following statutory law 2.03, neglect of duty art. 38.03, presumption of innocence. The following Constitutional Amendments 5th, 6th and 14th amendments and Articles 1, 2, 3, 10, 13, 19 and 29 of the Texas Constitutions. Clearly this is a systemic violation that is structural in nature, no harm applies, and this Court under Rule 10 of this Court should reverse the conviction.

QUESTION NUMBER TWO

2) WAS THE FEDERAL DISTRICT COURT AND THE FIFTH CIRCUIT COURTS FINDING CONTRARY TO FEDERAL LAW AND SUPREME COURT PRECEDENT WHEN THE PETITIONER'S ATTORNEY ALLOWED IN EXTRANEOUS OFFENSE EVIDENCE HE SPECIFICALLY FILED MOTION TO KEEP OUT? IN VIOLATION OF STATE STATUTORY LAW 403? UNITED STATES CONSTITUTIONAL AMENDMENT 6?

Was trial counsel ineffective when he opened the door to allow in extraneous evidence?

Petitioner's counsel was ineffective during cross-examination of Lacy(Pollock)

Chargios at page 106, Line 20-25, by Prosecutor Ms. Nelson:

Ms. Nelson: Judge before the jury comes out. When we are talking about when, you know Mr. Martin is asking her, you know why didn't she tell this person, this person. The State does believe he kind of opened the door to some extraneous that happend between the defendant and the mom in front of the children's presence. It goes to why they were so scared to tell anybody about what he was doing because of how he was treating the family in the terms of threats not only with guns but also with knives.

Prosecutor Ms. Nelson continues the argument on page 107, Lines 1-25.

Ms. Nelson; So I think it kind of opens the door as to the questioning that he laid out why you didn't go to this person, that person. Why were you so scared when he didn't say anything. Because it was already ingrained in her from watching how he treated mom.

The Court: Response?

Mr. Martin: Counsel: I never asked any of those kinds of questions why was she scared. I never talked about guns or knives or anything like that.

Ms. Nelson: He did specifically asked okay. You didn't go to this person and tell? You didn't tell your mom? You didn't tell this? He didn't threaten you? And she kept saying she's scared, she's scared, she's scared. She should be able to explain why she was scared of somebody who might not have told her specifically if you tell I'm going to kill you.

Petitioner's attorney objected under 401, 403 and asked for a 403 hearing. His objection was overruled by the Court and the prejudicial testimony was allowed in. In the interest of brevity clearly on the record Petitioner's attorney knew he had opened the door to otherwise inadmissible extraneous offense evidence. In violation of this Court's holding in Strickland v. Washington, 104 S.Ct. 2052, 2062.

The two prong Strickland test requires Appellant to show that (1)Counsel's performance fell below an objective standard of reasonableness; and (2)Counsel's performance

prejudiced his defense. Prejudice requires showing that but for counsel's unprofessional error's, that there is a reasonable probability that the result of the proceeding would have been different. For Petitioner to allow in this type of extraneous offense evidence it went to the heart of the State's case that Petitioner used a gun to committ this alleged assault. Petitioner's attorney was ineffective under this Court's holding in Strickland, one for opening the door to this otherwise inadmissible evidence and two prejudicing his defense by supporting the State claim in the indictment. The record prove the Federal District Court finding as well as the Fifth Circuit Court finding is contrary to and an unreasonable determination of the facts as interpreted by this Court in Strickland. We ask the Court to uphold it's precedent in Strickland and reverse on this ground.

QUESTION NUMBER THREE:

WAS THE FEDERAL DISTRICT COURT AND THE FIFTH CIRCUIT COURTS FINDING CONTRARY TO THE SUPREME COURT HOLDING IN STRICKLAND V. WASHINGTON? WHEN PETITIONER'S ATTORNEY FAILED TO OBJECT TO THREE WITNESSES WHO DID TESTIFY AGAINST PETITIONER. 403 STATUE., BUT DID OBJECT TO THE ONE WITNESS WHO DID NOT TESTIFY.

A review of Court's opinion on this ground the Court will find that the Federal District Court misstates several issues raised by Petitioner. The State argued that Petitioner said his petition would have been granted. What Petitioner actually argued that based on Pawlack there is a possibility that it would have been granted. So clearly that was a misstatement of fact.This Petitioner's argument for this Court's review, the State Court finding on his direct appeal.Petitioner never objected to the extraneous offense evidence as unfairly prejudicial under Rule 403. Although Appellant counsel did object to one witness testimony under 403 that witness did not testify. As Petitioner argued in his 11.07, 2254 and Application for COA. He was facing overwhelming prejudicial evidence under 38.37(2)(b), allowing the jury to hear unadjudicated sexual offense evidence. So for his lawyer to not object under 403 to the three witnesses

who did testify was ineffective under Strickland v. Washington, 104 S.Ct. 2052, both deficient and prejudicial. As Petitioner pointed out in the Court of Criminal Appeals holding in Pawlak v. State, the Court of Criminal Appeals stated when we examine the potential to impress the jury in some irrational but unforgetable way we cannot ignore our statement that sexually related bad acts and misconduct involving children are inherently inflammatory. See Wheeler, 67 S.W.3d at 889; Montgomery, 810 S.W.2d at 397. However, the plain language of 403 does not allow a trial court to exclude otherwise relevant evidence when that evidence is merely prejudicial. See Wheeler, 67 S.W.3d 879 (Tex.Crim.App.2002), Keller P.J. Concurring, explaining that the fact that proffered evidence is prejudicial is insufficient to exclude it under 403 of the Texas Rules of Evidence because only unfair prejudice is addressed by Rule 403.

Nevertheless, we stated in Mosely, admissible prejudicial evidence can become unfairly prejudicial by it's sheer volume. See Mosely, 983 S.W.2d at 263; Salazar, S.W.3d at 366, this was the argument Petitioner made. The Federal District Court did not argue that what happend to Petitioner was not unduly prejudicial. The Federal District Court argued that the images in Pawlak was overwhelming. Petitioner would argue the overwhelming prejudicial testimony faced by this Petitioner by the testimony of live witnesses was even more damaging than just the images Pawlak faced. Petitioner will conclude this argument by stating the reason the Court said Petitioner's argument should fail by the Court. Petitioner must independently establish deficient performance and actual prejudice to warrant relief under Strickland. This he has failed to do, Petitioner would disagree. Petitioner proved independently by the Court of Appeals opinion in Harris was ineffective under Strickland and prejudicial under Pawlak and Mosely. By not objecting under 403 Texas Rules of Evidence a statutory right that Petitioner was entitled to in this Court's holding in William v. Taylor, U.S. S.Ct. 1499, to the three witnesses who did testify. Petitioner proved under the Strickland standard that

his lawyers performance failed below an objected standard of reasonableness, (1) to not object under 403 the Pawlak standard; (2) there is a reasonable probability his argument based on Court of Criminal Appeals would have succeeded. The Federal District Court's finding and the Court of Criminal Appeals finding is contrary to the holding of this Court and requires this Court to exercise it's supervisory power under Rule 10.

QUESTION NUMBER FOUR

4) WAS THE DISTRICT COURT'S FINDING AND THE FIFTH CIRCUIT'S FINDING CONTRARY TO THE SUPREME COURT'S FINDING IN STRICKLAND V. WASHINGTON? AS WELL AS THE FIFTH CIRCUITS HOLDING IN US V. WILLIAMSON CITE AS 183 F.3D 458(5TH CIR.1999), U.S.C.A. 6?

Petitioner's last claim for this Court to consider is based on the objective record. The finding of the Fourteenth Court of Appeals opinion in Harris v. State, 475 S.W.3d 395(Tex.App.-[14th Dist.] 2015); Strickland v. Washington. The Sixth Amendment is the right to counsel, it is the right to effective counsel. Judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on having produced a just ressult.

The defendant must show that counsel's performance was deficient and second the deficient performance prejudice the defense. A reasonable probability sufficient to undermine confidence in the outcome. The right to effective assistance of counsel extend to the right of effective assistance of appellate counsel. Petitioner's attorney asserted that Article 38.37(2)(b) of the Texas Code of Criminal Procedure is unconstitutional because it violates the due process clause. Petitioner's counsel failed to cite any controlling law to support her argument and was inadequately briefed under Strickland v. Washington. On issue two Petitioner asserts that the trial court abused it's discretion by permitting three witnesses to testify about extraneous offenses that occured between them and Petitioner. The Petitioner's attorney should have

recognized from the objective record the trial transcripts that counsel's objection at the trial did not comport to the argument she was raising on appeal. U.S. v. Williamson, cite as 183 F.3d 458(5thCir.1999). Solid meretorious argument based on directly controlling precedent should be discovered by Petitioner's attorney and brought to the court's attention in order to provide effective assistance of counsel. U.S.C.A. Amendment 6. Failure to raise precedent as in Petitioner's counsel's case denied effective assistance of counsel to the Petitioner. Several federal circuits have held that appellate counsel is ineffective if counsel fails to raise a claim that is a dead bang winner. See Upchurch v. Bruce, 333 F.3d 1158(10thCir.2003); Cagler v. Mullin, 317 F.3d 1196(10thCir.2003); Fagan v. Washington, 942 F.2d 1155, 1157(7thCir.1999). These note failure to raise a substantial claim can be indicative only of oversight or ineptitude. For the State to argue that the Petitioner didn't demonstrate prejudice by his attorney's inadequate briefed writ is contrary to this Court's precedent as well as the Fifth Circuit's. The State Court's finding is contrary to Federal law as well as an unreasonable determination of the facts in light of the evidence produced by the objective record. U.S.C.A. Amend. 6. Petitioner is entitled to a COA and reversal on this ground.

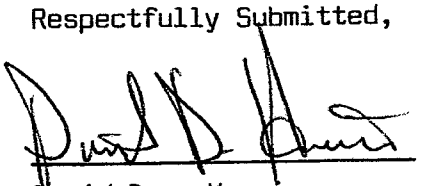
CONCLUSION

Petitioner understands the Supreme Courts function is to protect principles as well as interpret law that the founders wrote in the Bill of Rights. One of those is the presumption of innocence guaranteed in the Due Process Clause of the Fifth Amendment, see Holbrook v. Flynn. The State has continually eroded this principle to the point the founders probably wouldn't recognize it. As Petitioner stated before any testimony was taken in voir dire the jury could take the word of Jessica King as evidence of Petitioner's guilt. So clearly the State was not speaking in hypotheticals as they

claim but was violating his right to presumption of innocence. Principles; the right to counsel, the founder's stated it is fundamental to produce a fair and just society. This Court has interpreted this right as the right to not just counsel but the right to effective assistance of counsel. Appellate counsel is not just the right to an attorney but to the effective assistance of appellate counsel. Petitioner would ask this Court to protect these principles that this Petitioner has raised and that this Court has protected in it's precedents.

The petition fora writ of certiorary should be granted.

Respectfully Submitted,



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Dated: February 6, 2019