

19-6743

No. _____

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

PRO SE KENNETH D. NELSON — PETITIONER
(Your Name)

vs.

DECISION OF STATE COURT OF APPEALS ^{"ET AL"} — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

COURT OF APPEALS SIXTH APPELLATE DISTRICT STATE OF TEXAS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

KENNETH DEWAYNE NELSON
(Your Name)

3060 FM 3514
(Address)

BEAUMONT, TEXAS 77705
(City, State, Zip Code)

"NONE"
(Phone Number)

QUESTION(S) PRESENTED

ISSUE 1: THE VENIRE PANEL WAS INFORMED THAT NELSON HAD PLEAD GUILTY TO ALL FIVE CHARGES. WHEN NELSON CHANGE THOSE PLEAS BEFORE THE TRIAL ON THE MERITS BEGAN TO NOT GUILTY, WAS HE ENTITLED TO A NEW VENIRE PURSUANT TO THE RIGHT TO TRIAL BY JURY FOUND IN ARTICLE 1, SECTION 15 OF THE TEXAS CONSTITUTION AND TEXAS CODE OF CRIMINAL PROCEDURE ARTICLE 1.12 ?

ISSUE 2: THE VENIRE PANEL WAS INFORMED THAT NELSON HAD PLEAD GUILTY TO ALL FIVE CHARGES. WHEN NELSON CHANGE THOSE PLEAS BEFORE THE TRIAL ON THE MERITS BEGAN TO NOT GUILTY, WAS HE ENTITLED TO A NEW VENIRE PANEL PURSUANT TO THE RIGHT TO TRIAL BY JURY FOUND IN THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION ?

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:

[A] COURT OF APPEALS SIXTH APPELLATE DISTRICT STATE OF TEXAS

[B] THE FIFTH DISTRICT COURT OF BOWIE COUNTY

[C] COURT OF CRIMINAL APPEALS OF TEXAS

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OTHER

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☐ is unpublished.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☐ is unpublished.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☒ is unpublished.

The opinion of the STATE TRIAL COURT 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.

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**:

The date on which the highest state court decided my case was JUNE 17, 2019.
A copy of that decision appears at Appendix A.

☒ A timely petition for rehearing was thereafter denied on the following date: AUGUST 21, 2019, and a copy of the order denying rehearing appears at Appendix C.

☒ An extension of time to file the petition for a writ of certiorari was granted to and including "N/A" (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

THE FOLLOWING STATUTORY AND CONSTITUTIONAL PROVISIONS ARE INVOLVED IN THIS CASE.

SIXTH AMENDMENT

PAGE: 8

U.S. CONST., AMEND. VI

THIS RIGHT TO A JURY TRIAL MAY BE CIRCUMSCRIBED ONLY BY EXPRESS AND INTELLIGENT WAIVER.

TEXAS PENAL CODE § 20A.03

PAGE: 4

TEXAS CODE OF CRIMINAL PROCEDURE ARTICLE 1.12

THE RIGHT OF TRIAL BY JURY SHALL REMAIN INVIOLETE.

TEXAS R. APP. P. 44.2(B)

A SUBSTANTIAL RIGHT IS AFFECTED WHEN THE ERROR HAD A SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE IN DETERMINING THE JURY'S VERDICT.

RULE 10(B) CONSIDERATION GOVERNING REVIEW ON CERTIORARI

A STATE COURT OF LAST RESORT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE DECISION OF ANOTHER STATE COURT OF LAST RESORT OR OF A UNITED STATES COURT OF APPEALS.

RULE 10(C) CONSIDERATION GOVERNING REVIEW ON CERTIORARI

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.

STATEMENT OF THE CASE

THIS IS AN APPEAL FROM A CONVICTION FOR FIVE COUNTS OF CONTINUOUS TRAFFICKING OF PERSONS RELATING TO FIVE DIFFERENT ALLEGED VICTIMS, IN VIOLATION OF TEXAS PENAL CODE § 20A.03.

THE VENIRE PANEL WAS INFORMED THAT KENNETH DEWAYNE NELSON HAD PLEAD GUILTY TO FIVE COUNTS OF CONTINUOUS TRAFFICKING OF PERSONS. HE WAS GOING TO PROCEED BEFORE THE JURY FOR THE PUNISHMENT PHASE, HOWEVER, HE ENTERED A CHANGE OF PLEA TO NOT GUILTY BEFORE THE TRIAL ON THE MERITS BEGAN. IT WAS SIMPLY AN ERROR DURING THE PLEA THAT NELSON NEVER CONSIDERED UNTIL VERBAL INFLUENCE FROM HIS ATTORNEY AT PRE-TRIAL THE DAY BEFORE TRIAL. HIS ATTORNEY ATTEMPTED TO PREVENT DAMAGE OF THAT ERROR BY REQUESTING A MOTION FOR A FRESH VENIRE PANEL BEFORE THE TRIAL ON THE MERITS BEGAN, CITING THIS PANEL WAS HOPELESSLY TAINTED. THE TRIAL COURT ALLOWED NELSON A CHANGE OF PLEA BUT FORCED HIM TO TRIAL BEFORE THE TAINTED SELECTED FROM THAT PANEL. THE TRIAL COURT STATED:

"APPEALLANT WOULD BE MANIPULATING THE JUDICIAL PROCESS: THE ACCUSED WOULD PLEAD GUILTY, AND AFTER SEEING HOW DAMAGING THE STATE'S EVIDENCE IS, HE COULD TAKE THE STAND AND FORCE A NEW TRIAL BEFORE A NEW JURY BY DENYING AN ELEMENT OF THE OFFENSE. A DEFENDANT MAY NOT CREATE REVERSIBLE ERROR BY HIS OWN MANIPULATION." BEASLEY V. STATE, 634 S.W.2D 320 (TEX. CRIM. APP. 1982).

THE TRIAL COURT PROCEEDED ON THE MERITS AND AFTER THE STATE RESTED ITS CASE THE JURY FOUND NELSON GUILTY ON ALL COUNTS IN APPROXIMATELY FIVE MINUTES.

DURING DIRECT APPEAL THE APPELLATE COURT DENIED PRESERVATION OF ERROR UNDER THE GUIDELINES OF THE TEXAS CONSTITUTION CITING TRIAL COUNSEL FAILED TO MEET SPECIFICITY REQUIREMENTS.

~~IF THIS ARGUMENT IS CORRECT IT BASICALLY MEANS A DEFENDANT CANNOT CHANGE~~ HIS MIND AND RECEIVE A FAIR TRIAL BY JURY AND THAT JUST DOESN'T MAKE SENSE. NELSON SIMPLY CHANGED HIS PLEA ATTEMPTING TO EXERCISE HIS SIXTH AMENDMENT RIGHT OF RIGHT'S TO TRIAL BEFORE A FAIR AND IMPARTIAL JURY THAT WOULD BE BEFORE ANY EVIDENCE WAS REVEALED.

THE APPELLATE COURT DID ADDRESS THE MOTION FOR A FRESH VENIRE PANEL UNDER THE UNITED STATES SUPREME COURT CASE — KERCHEVAL V. UNITED STATES, 274 U.S. 220 (1927). IN KERCHEVAL THE DEFENDANT ENTERED A PLEA OF GUILTY AND WITHDREW THE GUILTY PLEA PRIOR TO TRIAL. THE APPELLATE COURT APPLIED THE SAME REASONING OF TEXAS LAW — A DEFENDANT CANNOT CREATE REVERSIBLE ERROR. THE APPELLATE COURT STATE'S KERCHEVAL CHANGE OF PLEA OCCURED DURING HIS SECOND TRIAL, WHEREAS NELSON CHANGE OF PLEA OCCURRED AT HIS INITIAL TRIAL. BASED ON THAT OPINION THE APPELLATE COURT OVERRULED THAT ARGUMENT.

THUS, NELSON FILED A PRO SE PETITION FOR DISCRETIONARY REVIEW WITH THE COURT OF CRIMINAL APPEALS OF TEXAS AND IT WAS EVENTUALLY REFUSED. NELSON FILED A PRO SE MOTION FOR REHEARING WITH THE COURT OF CRIMINAL APPEALS OF TEXAS AND IT WAS CONSEQUENTLY REJECTED FOR NON-COMPLIANCE WITH RULE 79.2(C) T.R.A.P.

RULE 79.2(C) STATES:

A MOTION FOR REHEARING AN ORDER THAT REFUSES A PETITION FOR DISCRETIONARY REVIEW MAY BE GROUNDED ONLY ON SUBSTANTIAL INTERVENING CIRCUMSTANCES OR ON OTHER SIGNIFICANT CIRCUMSTANCES WHICH ARE SPECIFIED IN THE MOTION. COUNSEL MUST CERTIFY THAT THE MOTION IS SO GROUNDED AND THAT THE MOTION IS MADE IN GOOD FAITH AND NOT FOR DELAY.

REASONS FOR GRANTING THE PETITION

I. THE SIXTH COURT OF APPEALS AT TEXARKANA DECIDED AN INTERESTING LEGAL ISSUE OF A TAINTED JURY RESULTING IN NELSON'S PLEA FROM GUILTY TO NOT GUILTY. RULE 10(B) OF "THE RULES OF THE SUPREME COURT OF THE UNITED STATES" VALIDATES THAT THIS DECISION IS IN QUESTION.

LAW AND APPLICATION

THE TRIAL COURT ALLOWED NELSON TO WITHDRAW HIS FIVE PRIOR GUILTY PLEAS. THEREFORE, THE TRIAL COURT SHOULD HAVE PLACED HIM IN THE SAME POSITION HE WAS PRIOR TO TRIAL. HOWEVER, THE JURY WAS ALREADY TAINTED BY BEING INFORMED OF NELSON'S FIVE PRIOR GUILTY PLEAS. ACCORDINGLY, THE TRIAL COURT SHOULD HAVE GRANTED NELSON'S REQUEST FOR A NEW VENIRE PANEL TO PROTECT HIS TEXAS CONSTITUTIONAL AND STATUTORY RIGHT TO A TRIAL BY JURY.

TEXAS CODE OF CRIMINAL PROCEDURE ARTICLE 1.12 PROVIDES:

RIGHT TO JURY. THE RIGHT OF TRIAL BY JURY SHALL REMAIN INVIOLEATE.

IN WILSON V. STATE, THE DALLAS COURT OF APPEALS CONSIDERED A TRIAL COURT'S REFUSAL TO ALLOW A JURY TRIAL WHEN A DEFENDANT WITHDREW A PRIOR GUILTY PLEA. 669 S.W.2D 792 (TEX. APP. — DALLAS 1984), AFF'D, 698 S.W. 2D 145 (TEX. CRIM. 1985). THERE, THE DALLAS COURT OF APPEALS CONCLUDED THAT THE TRIAL COURT HAD DISCRETION TO ALLOW A DEFENDANT TO WITHDRAW A GUILTY PLEA. ID. HOWEVER, THE COURT CONCLUDED THAT ALLOWING WITHDRAWAL OF A GUILTY PLEA, PLACED THE DEFENDANT "IN THE SAME POSITION IN WHICH IT WAS BEFORE ANY TRIAL HAD TAKEN PLACE." WILSON V. STATE, 669 S.W. 2D 792 (TEX. APP. — DALLAS 1984), AFF'D, 698 S.W. 2D 145 (TEX. CRIM. 1985).

UNDER THAT LEGAL REASONING, NELSON SHOULD HAVE BEEN PLACED IN THE SAME POSITION IN WHICH HE WAS BEFORE ANY TRIAL HAD TAKEN PLACE. HERE, THE VENIRE PANEL WAS INFORMED OF NELSON'S GUILTY PLEAS, TAINTING THE RESULTING JURY WITH REGARD TO THE ISSUE OF NELSON'S GUILT, AS SUCH, HE SHOULD RECEIVE A NEW UNTAINTED VENIRE PANEL TO CONDUCT VOIR DIRE.

THE TEXAS SUPREME COURT'S OPINION IN WILSON V. STATE STATED IN DICTA "WHEN A DEFENDANT PLEADS GUILTY BEFORE A JURY DURING TRIAL, CHANGES HIS PLEA TO NOT GUILTY, THE TRIAL PROCEEDS BEFORE THE SAME JURY." WILSON V. STATE, 698 S.W. 2D 145 (TEX. CRIM. APP. 1985). HOWEVER, THIS CONCLUSION WAS NOT MATERIAL TO THE RESOLUTION OF THE CASE AND WAS THEREFORE DICTA. ID. ADDITIONALLY, THE COURT WAS NOT ADDRESSING A SPECIFIC REQUEST FOR A NEW VENIRE PANEL BY THE DEFENDANT IN THE FACE OF A SPECIFICALLY TAINTED JURY. ID.

IN FAIRFIELD V. STATE THE TEXAS COURT OF CRIMINAL APPEALS NOTED THAT A PLEA OF GUILTY WAS CHARACTERIZED AS "THE ACKNOWLEDGEMENT OF THE FACTS CHARGED..." AND "ADMITS THE EXISTENCE OF ALL FACTS NECESSARY TO ESTABLISH GUILT." FAIRFIELD V. STATE, 610 S.W. 2D 771, 776 (TEX. CRIM. APP. 1981). HERE, THE VENIRE PANEL WAS INFORMED OF NELSON'S PLEA OF GUILTY TO THE FIVE CHARGES AGAINST HIM. ACCORDINGLY, THE RESULTING JURY WAS INFORMED THAT NELSON ACKNOWLEDGED THE FACTS CHARGED AND ADMITTED THE EXISTENCE OF ALL FACTS NECESSARY TO ESTABLISH GUILT. AS SUCH, IT WAS IMPOSSIBLE FOR NELSON TO RECEIVE A FAIR TRIAL ON THE ISSUE OF GUILT-INNOCENCE BEFORE THAT SAME JURY.

HARMFUL ERROR

AN ERROR MUST AFFECT THE SUBSTANTIAL RIGHTS OF THE ACCUSED TO BE HARMFUL. SEE TEX. R. APP. P. 44.2(B). "A SUBSTANTIAL RIGHT" IS AFFECTED WHEN THE ERROR HAD A SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE IN DETERMINING THE JURY'S VERDICT. ALTERNATIVELY, ERROR IS HARMLESS IF THE ERROR "DID NOT INFLUENCE THE JURY, OR HAD BUT A SLIGHT EFFECT." IN DECIDING IF ERROR IS HARMFUL, THE BURDEN DOES NOT REST WITH EITHER PARTY.

HERE, NELSON'S FIVE GUILTY PLEAS ACKNOWLEDGED THE FACTS CHARGED AND ADMITTED GUILT TO THE JURY. SEE, E.G., FAIRFIELD V. STATE 610 S.W. 2D 771, 776 (TEX. CRIM. APP. 1981). THEREFORE, THE ERROR IS HARMFUL.

II. THE SIXTH COURT OF APPEALS AT TEXARKANA DECIDED AN INTERESTING LEGAL ISSUE OF TAINTED JURY RESULTING IN NELSON'S CHANGE OF PLEA FROM GUILTY TO NOT GUILTY. RULE 10(C) OF "THE RULES OF THE SUPREME COURT OF THE UNITED STATES" VALIDATES THIS DECISION THAT IS IN QUESTION.

LAW AND APPLICATION

THE TRIAL COURT ALLOWED NELSON TO WITHDRAW HIS PRIOR GUILTY PLEAS. THEREFORE, THE TRIAL COURT SHOULD HAVE PLACED HIM IN THE SAME POSITION HE WAS PRIOR TO TRIAL. HOWEVER, THE JURY WAS ALREADY TAINTED BY BEING INFORMED OF NELSON'S GUILTY PLEAS. THEREFORE, THE TRIAL COURT SHOULD HAVE GRANTED NELSON'S REQUEST FOR A NEW VENIRE PANEL TO PROTECT HIS FEDERAL CONSTITUTIONALLY PROTECTED RIGHT TO A TRIAL BY JURY. NELSON WAS FORCED TO PROCEED TO TRIAL BEFORE A BIASED JURY WHICH WAS INFORMED THAT HE HAD ALREADY PLEAD GUILTY TO THE CHARGES THEY BEING ASK TO CONSIDER.

THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION PROVIDES:

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. CONST. AMEND. VI. THIS RIGHT TO A JURY TRIAL MAY BE CIRCUMSCRIBED ONLY BY EXPRESS AND INTELLIGENT WAIVER.

ADDITIONALLY, THIS RIGHT TO AN IMPARTIAL JURY EXTENDS TO A JURY WITHOUT BIAS. IN KERCHEVAL V. UNITED STATES, THE UNITED STATES SUPREME COURT SPECIFICALLY CONCLUDED THAT A WITHDRAWN PLEA OF GUILT CANNOT BE USED AS EVIDENCE OF GUILTY. 274 U.S. 220, 47 S. CT. 582, 71 L. ED. 1009 (1927). IN CONSIDERING THE WITHDRAWN GUILTY PLEA, THE COURT WROTE;

" THE EFFECT OF THE COURT'S ORDER PERMITTING THE WITHDRAWAL WAS TO ADJUDGE THAT THE PLEA OF GUILTY BE HELD FOR NAUGHT?" THEREFORE ITS LATER USE WAS CONTRARY TO THE COURT'S RULING, ID.

NELSON DID NOT KNOWINGLY WAIVE HIS CONSTITUTIONALLY MANDATE RIGHT. RATHER, NELSON SIMPLY ENTERED FIVE GUILTY PLEAS TO THE CHARGES AGAINST HIM AT TRIAL PRIOR TO VOIR DIRE. ACCORDINGLY, NELSON WAS FORCED TO PROCEED TO THE GUILT-INNOCENCE PHASE OF HIS TRIAL BEFORE THE SAME JURY WHO HAD ALREADY BEEN INFORMED OF HIS FIVE GUILTY PLEAS.

THE TRIAL COURT ALLOWED NELSON TO WITHDRAW HIS PLEA. THUS, PURSUANT TO KERCHEVAL V. UNITED STATES, THE PRIOR PLEA SHOULD HAVE BEEN "HELD FOR NAUGHT." REGARDLESS, THE TRIAL COURT REQUIRED NELSON TO PROCEED TO TRIAL BEFORE THE SAME JURY WHICH HAD ALREADY BEEN INFORMED ON HIS GUILT. HERE, NELSON COULD NOT ADDRESS THE BIAS ISSUE DURING VOIR DIRE BECAUSE THE BIAS WAS ONLY CREATED ONCE NELSON CHANGE HIS PLEA FROM GUILTY TO NOT GUILTY. HERE, THE THE JURY WAS INFORMED OF NELSON'S ABSOLUTE ADMISSION TO HIS GUILT TO THE FIVE CHARGES AGAINST HIM. THEN THAT SAME ISSUE WAS SUBMITTED TO THE JURY.

HARMFUL ERROR

AN ERROR MUST AFFECT THE SUBSTANTIAL RIGHTS OF THE ACCUSED TO BE HARMFUL. SEE TEX. R. APP. P. 44.2(B). A "SUBSTANTIAL RIGHT" IS AFFECTED WHEN THE ERROR HAD A SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE IN DETERMINING THE JURY'S VERDICT. ALTERNATIVELY, ERROR IS HARMLESS IF THE ERROR "DID NOT INFLUENCE THE JURY, OR HAD BUT A SLIGHT EFFECT?" IN DECIDING IF ERROR IS HARMFUL, THE BURDEN DOES NOT REST WITH EITHER PARTY.

IN KERCHEVAL V. UNITED STATES, THE UNITED STATES SUPREME COURT CONSIDERED A JURY WHICH HEARD A DEFENDANT'S PRIOR GUILTY PLEA. 274 U.S. 220, 47 S. CT. 582, 71 L. ED. 1009 (1927). THE COURT DISCUSSED ITS AFFECT ON A JURY AND IMPLICITLY CONCLUDED IT WAS HARMFUL. ID.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KENNETH D. NELSON

Date: OCTOBER 30, 2019