

In the
Supreme Court of the United States

DON WILBURN COLLINS,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition for a Writ of Certiorari to the
Texas Court of Appeals for the Ninth District of Texas

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Texas appellate courts fail to realize that the retroactive expansion of jurisdiction over a previously exempt juvenile for capital murder violated his *ex post facto* rights under the United States Constitution?

LIST OF PROCEEDINGS

Court of Criminal Appeals of Texas

No. PD-435-20

Don Wilburn Collins v. The State of Texas

Date of Final Opinion: February 10, 2021

Court of Appeals for the
Ninth District of Texas at Beaumont

No. 09-15-00089-CR

Don Wilburn Collins v. The State of Texas

Date of Final Opinion: March 29, 2017

359th District Court of Montgomery County, Texas

No. 15-01-00728

The State of Texas v. Don Wilburn Collins

Date of Judgment of Conviction by Court:
February 10, 2015

359th District Court of Montgomery County, Texas
Nos. 6317-JV, 13-09-009849-JV, and 14-05-05423,
consolidated into No. 15-01-00728 in the 359th District
Court of Montgomery, Texas

The State of Texas v. Don Wilburn Collins

Date of Order Consolidating Cases: March 2, 2015

Juvenile Court of Montgomery County, Texas
Nos. 13-09-009849-JV, 12-09-09943-JV, and 6317-JV,
consolidated into No. 14-05-05423 in the 359th District
Court of Montgomery, Texas

The State of Texas v. Don Wilburn Collins

Date of Order Consolidating Cases: July 9, 2014

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Don Wilburn Collins, respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals in this case.



OPINIONS BELOW

The 359th District Court of Texas, Montgomery County, following a jury trial, entered a judgment of conviction on February 11, 2015. (App.45a). The Court of Appeals, Ninth District of Texas of Beaumont affirmed the judgment on March 29, 2017. (App.2a, 43a). The Texas Court of Criminal Appeals denied a petition for discretionary review on February 10, 2021. (App.1a).



JURISDICTION

This Court has jurisdiction over the petition pursuant to 28 U.S.C. § 1257(a), as the denial of review by the Texas Court of Criminal Appeals (App.1a) is the final judgment rendered by the state courts of Texas.



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional provisions and statutes are included below in the appendix.

Constitutional Provisions

- U.S. Const. Art I, § 9. (App.53a)

Texas Statutes

- Texas Family Code, Act 1995, 74th Leg., ch. 262, § 34(j)(1) and (2)(A), eff. Jan.1, 1996. (App.54a)
- Texas Family Code, Act 1999, 76th Leg., ch. 1477, § 8(j)(1) and (2), eff. Jan. 1, 1999. (App.59a)
- Texas Family Code, Act 1999, 76th Leg., ch. 1477, § 39(a) and (d), eff. Sept. 1, 1999. (App.65a)
- Texas Government Code, § 311.015. (App.68a)
- Texas Government Code, § 311.016. (App.68a)
- Texas Government Code, § 311.021. (App.69a)
- Texas Government Code, § 311.022. (App.70a)



STATEMENT OF THE CASE

This is an appeal of a Texas capital murder conviction in a juvenile case and a sentence of 40 years imprisonment. The issues in the case involve constitutional provisions of the United States regarding *ex post facto* laws and their retrospective application to a defendant.

A. Procedural History

1. September 18, 2012–Petition for Discretionary Transfer–Murder (CR II, 106).
2. October 12, 2012–Motion and Order to Dismiss the Petition for Discretionary Transfer (CR II, 112).
3. September 16, 2013–Petition for Discretionary Transfer (COA, 12; no record copy).
4. January 22, 2015–Indictment (CR V, 629).
5. January 30, 2015–Order of Transfer (CR V, 642; no record copy).
6. February 11, 2015–Order Consolidating Case in Nos. 6317-JV, 13-09-009849-JV, and 14-05-05423, consolidated into No. 15-01-00728 (CR II, 119).
7. February 10, 2015–Judgment of Conviction and sentence (CR5, 697).
8. February 15, 2015–Notice of Appeal (CR5, 707).
9. October 23, 2015–Brief filed with 9th Court of Appeals (09-15-00089-CR).
10. March 29, 2017–9th Court of Appeals affirmed.

11. May 15, 2017–Filed Petition for Discretionary Review with the Texas Court of Criminal Appeals (PD-0469-17) which was “stored”.

12. November 12, 2019–Filed Application for a Writ of Habeas Corpus with the Texas Court of Criminal Appeals (WR-90,936-01)

13. April 1, 2020–Relief granted by the Texas Court of Criminal Appeals on Writ of Habeas Corpus, approving an extension to file Out-of-Time Petition for Discretionary Review.

14. May 6, 2020–Extension of time granted by the Court of Criminal Appeals in which to file the Petition for Discretionary Review (PD-0435-20).

15. June 23, 2020–Petition for Discretionary Review filed with the Court of Criminal Appeals (PD-0432-20).

16. February 10, 2021–Refusal of Petition for Discretionary Review from the Court of Criminal Appeals (PD-0435-20).

B. Facts Material to Consideration of Questions Presented

In June of 1998, Robert Middleton, an eight-year-old child, was doused with gasoline by Don Wilburn Collins, a 13-year-old child, born on April 4, 1985, and set on fire (Clerk’s Record 2, 106). Middleton suffered burns over 95% of his body and later developed skin cancer due to complications from his burn wounds in 1998, and died in April 2011. The 1998 Texas Family Code § 54.02(j) prohibited the transfer and prosecution of thirteen-year-old juveniles in felony court and further prohibited the transfer and prosecution of children who

had reached their eighteenth birthday before being prosecuted. Acts 1995, 74th Leg., ch. 262, § 34(j)(2)(A), eff. Jan. 1, 1996 In 1999, the Texas Legislature amended § 54.02(j)(2)(A) of the Texas Family Code to permit the transfer and trial of children charged with felony capital murder to ages 10 but under age 17 effective September 1, 1999. Acts, 1999, 76th Leg., ch 1477, § 8, effective September 1, 1999.

After Middleton's death in 2011, Petitioner was charged with Middleton's murder, transferred to felony court for trial, convicted of capital murder, and sentenced to 40 years imprisonment pursuant to the 1999 amendments to Texas Family Code § 54.02(j)(2)(A). Family Code § 1477, § 8, eff. September 1, 1999.

Petitioner says the application of the 1999 Texas Family Code Amendments § 54.02(j)(2)(A) to Petitioner's case violated his rights under the *ex post facto* provisions of the Constitution, Art I, sec. 9.

The transfer and prosecution of Petitioner's juvenile capital murder case pursuant to the 1999 Texas Family Code Amendments was a violation of Petitioner's rights under the *ex post facto* provisions of art. 1, § 9 of the United States Constitution, as the State brought a case against the Petitioner from which he was immune when the act that began this was committed.

An *ex post facto* law is one which either (1) punishes as a crime an act previously committed which was innocent when done; (2) changes the punishment and inflicts a greater punishment than the law attached to a criminal offense when committed; (3) deprives a person charged with a crime any defense available at the time the act was committed; or (4)

alters the legal rules of evidence, and receives less, or different testimony than the law required at the time of the commission of the offense in order to convict the offender. *Carmell v. Texas*, 529 U.S. 513 (2000).

In 1998, the Texas Family Code prohibited both the transfer and prosecution of thirteen (13) year old children in district court and transfer and prosecution of children in district court who had reached the age of 18 prior to their transfer and prosecution. Act of May 31, 1995, 74th Leg., R.S., ch 262, § 34.

Petitioner was 13-years-old on June 28, 1998 (DOB: April 4, 1985) and was exempt from transfer and prosecution as an adult in felony court under Texas law. The State of Texas, in the person of the County Attorney who handled this matter, brought juvenile petitions for assault. However, County Attorney dismissed them, thus willfully allowing the Petitioner to age out past juvenile jurisdiction for the underlying assault. In so doing, it exposed Petitioner to a punishment much more severe than the six or so years he might have spent in a juvenile institution in Texas. The transfer exposed Petitioner to a lengthy adult prison sentence for either assault [aggravated by serious bodily injury in this case] or capital murder.

Likewise, Petitioner was 27 years of age at the time he was transferred and tried for the murder of Middleton and was exempt from transfer and prosecution in felony court. Petitioner and his attorneys began challenging the possible transfer of his juvenile case to felony court as an *ex post facto* violation of his rights on January 8, 2014, by written motion during juvenile proceedings in Petitioner's case [The clerk's record in Volume 3 shows the motion at pg 169.] Peti-

tioner has continued to maintain his *ex post facto* defense throughout each appellate step in his case. Defense counsel argued specifically that application of the 1999 Texas Family Code Amendments to his case would deprive him of the opportunity to challenge the jurisdiction of the trial court to transfer and prosecute him for acts which were not prosecutable when done. At the conclusion of the transfer hearing, the Court transferred Petitioner's case for trial to felony court upon a charge of felony capital murder pursuant to the provisions of the 1999 amendments to § 54.02(j) of the Texas Family Code (7 R.R. 84).

Petitioner was 29-years-old at the time of his trial. When Petitioner's case was transferred, he became subject to a sentence of life imprisonment in the event of his conviction for capital murder. Tex. Penal Code Ann. § 12.31(a).

By prosecuting Petitioner under the provisions of the 1999 Family Code Amendments, he became subject to a possible life imprisonment upon conviction for murder rather than a 40-year sentence under §§ c) and (3) of the 1995 Texas Family Code. The exposure to more severe sentences upon transfer violated the provisions of *ex post facto*, as did the appellate court's approval of a retroactive application of the jurisdictional expansion. *Miller v. Florida*, 482 U.S. 423 (1987).



REASONS FOR GRANTING THE PETITION

1. The Texas appellate courts failed to realize that the retroactive expansion of jurisdiction over a previously exempt juvenile for capital murder violated his *ex post facto* rights under the United States Constitution.

2. The Texas appellate court approved this saying that the expansion of jurisdiction was merely procedural and did not implicate the *ex post facto* clause. The Texas Court of Criminal Appeals refused review.

PROSPECTIVE V. RETROSPECTIVE STATUTES

Under Texas law, an amendment to a statute is presumed not to apply retrospectively. *Russell v. Board of Trustees of Fireman, Policemen and Fire Alarm Operators' Pension Fund of Dallas Tex.*, 968 F.2d 489, rehearing denied, *certiorari denied* 507 U.S. 914 (1999).

A Texas statute is presumed to be prospective in its operation unless expressly made retrospective. V.T.C.A., Government Code § 311.022; *State v. Arellano*, 801 S.W.2d 128, 131 (Tex.App.—San Antonio 1990; no pet.).

Laws are deemed retrospective and within the constitutional prohibition, which by retrospective operation, destroy or impair, vested rights. *Decordova v. City of Galveston*, 4 Tex. 470, 479 (1849).

The State's position regarding the application of the 1999 Family Code Amendments to Petitioner's case was that the Legislature made the 1999 amendments

to the discretionary statute apply to any motion seeking a transfer if the motion was filed after September 1999. Act of May 27, 1999, 76th Leg., R.S. ch. 1477, Section 39(d) Section 39(d) of the 1999 amendments provides as follows:

Section 39(d). The change in law made by Section 8 of this Act applies to discretionary transfer proceedings in which the discretionary transfer petition or motion was filed on or after the effective date of this Act.

The County filed the transfer motion in question on September 16, 2013. The Texas 9th Court of Appeals held that the enabling language in the 1999 amended discretionary transfer statute authorized the juvenile court to transfer Petitioner's case for trial.

The 1999 Amendments to Texas Family Code Section 54.02(j) contain no affirmative statement by the Legislature that the Amendments were to apply retrospectively. Consequently, the intent of the Legislature is controlling concerning the application of the 1999 Amendments to Petitioner's case. *State v. Arellano*, 801 S.W.2d at 131.

Petitioner says the 1999 Texas Legislature manifested its intent that the 1999 Amendments to Texas Family Code Section 54.02(j), effective September 1, 1999, were not to be applied retrospectively to his case by including Section 39(a) in the 1999 amendments. Section 39(a) provides as follows:

Section 39(a). Except as provided otherwise by this section, the change in law made by this Act applies only to conduct that occurs on or after the effective date of this Act. Conduct violating a penal law of the state occurs on

or after the effective date of this Act if every element of the violation occurs on or after that date. Conduct that occurs before the effective date of this Act is covered occurred, and by the law in effect at the time the conduct the former law is continued in effect for that purpose.

An examination of the elements of Petitioner's charge from the Clerk's record reveals that every element of Petitioner's charge occurred in 1998, save and except the death of Middleton. Consequently the 1999 Amendments to the 1998 Texas Family Code were erroneously applied to Petitioner's case in violation of the *ex post facto* provisions of the United States Constitution. Pursuant to Supreme Court Rule 10 this matter could potentially affect thousands of juveniles across the country because, if allowed to stand, it permits any mistake made during youth to be brought back to criminal life for transfer to the criminal adult courts. It is in clear conflict with federal law as interpreted by the Fourth Circuit. *See United States v. Juvenile Male*, 819 F.2d 468 (4th Cir. 1987). It is in clear conflict with other states. *See Commonwealth v. Jaimie Fuller*, 421 Mass. 400 (1995).

It is also a mistake by the Texas courts to begin their analysis by looking at the date of the transfer order, which the 9th Court of Appeals did (*see* Opinion, App.3a). It has been well-settled law for nearly two hundred years that the relevant date for *ex post facto* analysis is the date of the offense, not the date of prosecution. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390-91 (1798); *Weaver v. Graham*, 450 U.S. 24, 30-31, 101 S.Ct. 960, 965, 67 L.Ed.2d 17 (1986).



CONCLUSION

The Petitioner respectfully prays that writ of certiorari should be granted by the Court.

Respectfully submitted,

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