

No. \_\_\_\_\_

IN THE UNITED STATES SUPREME COURT  
WASHINGTON, DC

THE STATE OF TEXAS, Appellee

v.

ROBERT EARNEST WILKERSON, Appellant

**PETITION FOR WRIT OF CERTIORARI**

RELIGIOUS FREEDOM – MUSHROOMS AS A SACRAMENT

Appealed from Case No. PD-1307-20 in the

COURT OF CRIMINAL APPEALS

OF TEXAS

Reviewing the Fort Worth Court of Appeals of Texas

COA No. 02-19-00210-CR

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Texas Bar. No. 15342850  
For Petitioner  
Robert Earnest Wilkerson

## Certificate of Interested Persons

Appellant	Robert Earnest Wilkerson
Trial Judge	Ralph H. Walton, Jr.
Retained Trial Attorney	Richard L. Hattox
Court Appointed Appellate Attorney	Andrew Ottaway
State's Attorneys at Trial and Appeal	Ryan Sinclair, District Atto David Tucker, ADA Jessica Arnold, ADA Tiffany Van Slyke, ADA Willem Van Zeben, ADA

## Record References

Robert Earnest Wilkerson uses the following references in this Petition:

“CR \_\_\_” refers to the district court clerk’s record on appeal.

“RR \_\_\_” refers to the district court reporter’s record on appeal.

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Gonzales v O Centro Espirita Beneficente Unal do Vegetal,  
546 US 418 (2005) 7

State of Utah v Mooney, 98 P3d 420 (Supreme Court of Utah 2004) 7

### Statutes:

Texas Civil Practice and Remedies Code

Section 110.001 6

Texas Health and Safety Code

Section 481.113 5

United States Code

Federal Controlled Substances Act 21 USC 812(c) 7

Religious Freedom Restoration Act 42 USC 21B 7

## Issue Presented for Review

**Appellant has a sincere religious belief in his use of psilocin mushrooms for religious ceremonies. The Texas Courts erred in finding that error was not preserved. Refusing to recognize religious beliefs is fundamental error.**

## Statement of the Case

Petitioner was indicted in Hood County, Texas, on August 2, 2017, for the offense of possession of Psilocin Mushrooms, alleged to have been committed on April 12, 2016. The indictment charged a first degree felony under Section 481.113 of the Health and Safety Code, Clerk's Record pp 7-8.

A motion to dismiss, based on a sincerely held religious belief in Petitioner's use of psilocin mushrooms in his religious ceremonies, appears at Clerk's Record pp 136-138. No ruling was ever obtained on the motion.

The case came on for a jury trial on May 6, 2019. The jury set punishment at 17 years in the penitentiary and a fine of \$10,000.00. Appellant is confined at this time.

## **Statement of Procedural History**

## COA Opinion Affirming Conviction

December 5, 2019

Petition for Discretionary Review Refused

February 12, 2020

## **Ground for Review**

Appellant has a sincere religious belief in his use of psilocin mushrooms for religious ceremonies and the Texas Courts erred in finding that error was not preserved. Refusing to recognize religious beliefs is fundamental error.

## **Argument**

The Fort Worth Court of Appeals found that error was not preserved with regard to a motion to dismiss filed by defense counsel, saying that no ruling was ever obtained. However, refusing to accommodate sincere religious beliefs is fundamental error.

The Texas Civil Practice and Remedies Code, as codified in Title 5, Government Liability, provides:

### **CHAPTER 110. RELIGIOUS FREEDOM**

Sec. 110.001. DEFINITIONS. (a) In this chapter:

(1) "Free exercise of religion" means an act or refusal to act that is substantially motivated by sincere religious belief. In determining whether an act or refusal to act is substantially motivated by sincere religious belief under this chapter, it is not necessary to determine that the act or refusal to act is motivated by a central part or central requirement of the person's sincere religious belief.

There are no Texas cases on point, but this is a case of first impression. In a good faith effort to extend the jurisprudence in this area, Petitioner cited the Court of Appeals to State of Utah v. James W. Mooney, aka James W.B.E. Mooney, Linda T. Mooney, and Oklevueha Earthwalks Native Church of Utal, Inc., 98 P.3d 420, (Supreme Court of Utah 2004) and the cases cited therein. The Mooney case holding was that “Utah law incorporates a federal regulation exempting from prosecution members of the Native American Church who use peyote in bona fide religious ceremonies.” Mooney at p 422.

Petitioner also cited the Court of Appeals to a similar federal law entitled The Religious Freedom Restoration Act of 1993 prohibits any agency, department, or official of the United States of any State from substantially burdening a person’s exercise of religion, even if the burden results from a rule of general applicability.

CR pp 91-97.

#### 42 U.S. Code Chapter 21B - RELIGIOUS FREEDOM RESTORATION

This provision was discussed in the case of Gonzales v. O Centro Espirita Beneficente Unial do Vegetal, 546 US 418 (2005). That case involved members of a church receiving communion by drinking hoasca, a tea brewed from plants unique to the Amazon Rainforest that contained a hallucinogen that was regulated by the Federal Controlled Substances Act in 21 USC 812(c). In Gonzales, the Supreme Court of the United States affirmed the granting of relief based on the

Government's failure to demonstrate a compelling interest justifying the substantial burden on the church.

Appellant presented evidence at the trial that he was a member of a church that used psilocin mushrooms as a sacrament during religious services. The Court of Appeals found that error was not preserved as to Appellant's sincerely held religious beliefs because trial counsel did not obtain a ruling on the Motion to Dismiss. However, the evidence is sufficient to show the Court that Petitioner held sincere religious beliefs, and to disregard his beliefs constitutes fundamental error.

#### Conclusion and Relief Sought

Refusing to recognize sincere religious beliefs is fundamental error. The Supreme Court should review this case to determine if the refusal of the Texas Courts to recognize the use of psilocin mushrooms in a religious ceremony is fundamental error.

Andrew Ottaway, Lawyer for Petitioner  
PO Box 1679, Granbury, Texas 76048  
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[ottaway9@swbell.net](mailto:ottaway9@swbell.net)  
Texas Bar. No. 15342850

Certificate of Service

A copy of this document was served upon Ryan Sinclair, District Attorney,  
1200 West Pearl Street, Granbury, Texas 76048.

Dated: June 1, 2020 /s/Andrew Ottaway

No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

Robert Ernest Wilkerson PETITIONER  
(Your Name)

VS.  
The State of Texas RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

Please check the appropriate boxes:

Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

355th District Court of  
Hood County, Texas

Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding, and:

The appointment was made under the following provision of law: \_\_\_\_\_

a copy of the order of appointment is appended.

*TXSBN15342850*, or

*Andrew Ottaway*  
6/1/20 (Signature)  
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OTTAWAY LAW OFFICE  
P.O. BOX 1679  
GRANBURY, TX 76048

**AFFIDAVIT OR DECLARATION  
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS***

I, ROBERT WILKERSON, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

<b>Income source</b>	<b>Average monthly amount during the past 12 months</b>		<b>Amount expected next month</b>	
	<b>You</b>	<b>Spouse</b>	<b>You</b>	<b>Spouse</b>
Employment	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____
Self-employment	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____
Income from real property (such as rental income)	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____
Interest and dividends	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____
Gifts	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____
Alimony	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____
Child Support	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____
Retirement (such as social security, pensions, annuities, insurance)	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____
Disability (such as social security, insurance payments)	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____
Unemployment payments	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____
Public-assistance (such as welfare)	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____
Other (specify): <u>N/A</u>	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____
<b>Total monthly income:</b>	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____

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	<b>You</b>	<b>Your spouse</b>
Transportation (not including motor vehicle payments)	\$ <u>0</u>	\$ _____
Recreation, entertainment, newspapers, magazines, etc.	\$ <u>0</u>	\$ _____
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	\$ <u>0</u>	\$ _____
Life	\$ <u>0</u>	\$ _____
Health	\$ <u>0</u>	\$ _____
Motor Vehicle	\$ <u>0</u>	\$ _____
Other: _____	\$ <u>0</u>	\$ _____
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	\$ <u>0</u>	\$ _____
Installment payments		
Motor Vehicle	\$ <u>0</u>	\$ _____
Credit card(s)	\$ <u>0</u>	\$ _____
Department store(s)	\$ <u>0</u>	\$ _____
Other: _____	\$ <u>0</u>	\$ _____
Alimony, maintenance, and support paid to others	\$ <u>0</u>	\$ _____
Regular expenses for operation of business, profession, or farm (attach detailed statement)	\$ <u>0</u>	\$ _____
Other (specify): _____	\$ <u>0</u>	\$ _____
<b>Total monthly expenses:</b>	\$ <u>0</u>	\$ _____

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A	N/A	N/A	\$ N/A

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
			\$
			\$
			\$

4. How much cash do you and your spouse have? \$ \_\_\_\_\_  
 Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Type of account (e.g., checking or savings)	Amount you have	Amount your spouse has
	\$	\$
	\$	\$
	\$	\$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

Home  
 Value \_\_\_\_\_

Other real estate  
 Value \_\_\_\_\_

Motor Vehicle #1  
 Year, make & model \_\_\_\_\_  
 Value \_\_\_\_\_

Motor Vehicle #2  
 Year, make & model \_\_\_\_\_  
 Value \_\_\_\_\_

Other assets  
 Description \_\_\_\_\_  
 Value \_\_\_\_\_

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

<b>Person owing you or your spouse money</b>	<b>Amount owed to you</b>	<b>Amount owed to your spouse</b>
<u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>
	\$ _____	\$ _____
	\$ _____	\$ _____

7. State the persons who rely on you or your spouse for support. For minor children, list initials instead of names (e.g. "J.S." instead of "John Smith").

<b>Name</b>	<b>Relationship</b>	<b>Age</b>
_____	_____	_____
_____	_____	_____
_____	_____	_____

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	<b>You</b>	<b>Your spouse</b>
Rent or home-mortgage payment (include lot rented for mobile home)	\$ _____	\$ _____
Are real estate taxes included? <input type="checkbox"/> Yes <input type="checkbox"/> No		
Is property insurance included? <input type="checkbox"/> Yes <input type="checkbox"/> No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	\$ _____	\$ _____
Home maintenance (repairs and upkeep)	\$ _____	\$ _____
Food	\$ _____	\$ _____
Clothing	\$ _____	\$ _____
Laundry and dry-cleaning	\$ _____	\$ _____
Medical and dental expenses	\$ _____	\$ _____

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9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

Yes  No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form?  Yes  No

If yes, how much? \_\_\_\_\_

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

Yes  No

If yes, how much? \_\_\_\_\_

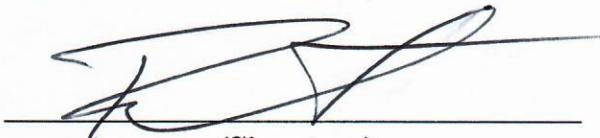
If yes, state the person's name, address, and telephone number:

N/A

12. Provide any other information that will help explain why you cannot pay the costs of this case.  
I HAVE BEEN SEPERATED FROM MY WIFE SINCE OCTOBER 2018.  
I HAVE BEEN INCARCERATED SINCE MAY 2019. I'M CURRENTLY  
HOUSED ON THE CHOICE MOORE UNIT (TDCJ) I HAVE BEEN  
UNEMPLOYED SINCE 2016 DUE TO BAIL'S WEEKLY DRUG TEST.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: May 28, 2020



(Signature)

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2/12/2020  
**WILKERSON, ROBERT EARNEST** Tr. Ct. No. CR13905  
COA No. 02-19-00210-CR PD-1307-19  
On this day, the Appellant's petition for discretionary review has been refused.

Deana Williamson, Clerk

ROBERT EARNEST WILKERSON  
MOORE, C. UNIT - TDC # 2265492  
1700 N. FM 87  
BONHAM, TX 75418

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