

21-5424

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.  
FILED

JUN 23 2021

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VICTOR HUGO CAVALES - PETITIONER  
(Your Name)

VS.

BOBBY LUMPKIN, Director, - RESPONDENT (S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, No. 20-40871  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

VICTOR HUGO CAVALES TDCJ-10 # 2064303  
(Your Name)

Wallace Unit 1675 South FM 3525  
(Address)

Colorado City, Texas 79512  
(City, State, ZIP Code)

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### QUESTION(S) PRESENTED

Prosecutrix conduct was improper, that she concerned "was not familiar with that area of the law" at the Petitioner trial process, trial counsel failed seek curative instructions following sustained objection to voluminous hearsay contained within state's exhibit number five, alibi witnesses, trial counsel failed to search for witnesses or witnesses statements and the seriousness trial error in context of entire proceeding in the effects the fairness, integrity, or public reputation of judicial proceedings.

## 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:

## RELATED CASES

- Gochicoa v. Johnson, No. P-95-CA-036, U.S. District Court of the Western District of Texas. Judgment entered March 24, 1999.
- Gochicoa v. Johnson, Nos. 95-50785, 97-50159, U.S. Court of Appeals for the Fifth Circuit. Judgment entered Aug. 4, 1997.
- U.S. v. Sandoval-Gonzalez, No. 308-cv-03421-BEN-1, U.S. District for the Southern District of California. Judgment entered August 5, 2010.
- U.S. v. Sandoval-Gonzalez, No. 09-50446, U.S. Court of Appeals for the Ninth Circuit.
- U.S. v. Urciouli No. 07-1297, U.S. District Court for the District of Rhode Island. Judgment entered Dec. 3, 2007.
- U.S. v. Urciouli No. 07-1327 U.S. Court of Appeals for the First Circuit. Judgment entered Jan. 18, 2008.

- Montgomery v. Peterson; 664 F. Supp. 398, U.S. District Court for the Central District of Illinois. Judgment entered Dec. 10, 1987.
- Montgomery v. Peterson, No. 87-2302, U.S. Court of Appeals for the Seventh Circuit. Judgment entered May, 4, 1988.

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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 judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix C 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 B 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 Court of Criminal Appeals court 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.

## JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 01-29-2021.

☒ 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 Order 0010-19 (date) on 150 days (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 7/3/2019.  
A copy of that decision appears at Appendix A.

☐ A timely petition for rehearing was thereafter denied 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. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Amendment VI. [1791] and Amendment XIV [Proposed 1866; Ratified 1868] to the United States Constitution, which 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 where in 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 defence.

Amendment XIV. Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

Petitioner's has an non-citizen proceeding *Pro se* and *Forma Pauperis* he has construed this case no school education in the United States he do not know the English language well and has no legal education.

The Petitioner's is unlawfully confined and restrained of his liberty by Bobby Lumpkin, Director, Petitioner's has be truthful at trial court and during the period of his claim of Petitioner's pursuant to a judgment and sentence out of the 148th District Court of Nueces County, Texas in cause number 15-CR-1179-E. S.L. victim (because the victim was a 12-year-old minor this petition for writs of certiorari refers to her as S.L. rather than by her full name) made an outcry to her out about things that had happened to her. 3 RR 103.

Petitioner's was arrested for the offense of continuous sexual abuse to child that appeared to have taken place in Nueces County, Texas. 3 RR 157-58. Petitioner's is married to S.L.'s mother and they previously live together in Nueces County, Texas. 3 RR 49. Petitioner's had incidences of arrests and deportation for illegally entering the United States and also probation for charges of the third degree possession of twenty pounds of marijuana charge in 2010. 4 RR 56-61.

Petitioner's had been able to attack this claim with only sources on his appellant's brief it is Appendix E without any opportunity

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for an evidentiary hearing D.E. 8 denied on December 27, 2019. Discovery D.E. 8 was denied and strike D.E. 24, 29.

Petitioner's raises multiple claims of ineffective assistance of trial and appellate counsel, prosecutorial misconduct, and trial court error. Respondent filed a motion for summary judgment, to which Petitioner's has responded. D.E. 15, 25. On the order adopting memorandum & recommendation the U.S. District Judge David S. Morales adopt the Magistrate Judge Julie Hampton's memorandum and recommendation (M&R) D.E. 33, denied Petitioner's petition of habeas corpus D.E. 1; granting respondent's motion for summary judgment D.E. 15; overrules Petitioner's objection D.E. 44; and granting a certificate of appealability only on the issue Petitioner's claim that trial counsel was ineffective for failing to object to the state's questioning about his prior drug conviction. D.E. 33 at 23. Please See Appendix B.

Petitioner moves in the District Court filing a Rule 60(b)(6) motion of the Federal Rules of Civil Procedure motion for seeking relief from the operation of the judgment. D.E. 56. Because the District Court as considered Petitioner's premature motion for a certificate of appealability in D.E. 45, and also premature notice of appeal D.E. 46, was considered timely. Please See Appendix B.

The District Court Magistrate Judge Julie K. Hampton D.E. 57 M&R respond to the Rule 60 motion, she state "motion is construed as motion to alter or amend the judgment under Federal Rule of Civil 5.

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Procedure 59(c) and she recommended that Petitioner's motion be denied. Petitioner's moves in court and object to the M&A.D.E. 57. He requesting let it now construed amend request for certificate of appealability under Rule 59(c). Objection to the M&A /E, has not yet decided.

In the transcourse of Petitioner's at the District Court has discussed above, the Court of Appeals Fifth Circuit dismiss Petitioner's appeal for want of jurisdiction. Please See Appendix C. Petitioner's move fast mailed in the Court of Appeals on February 8, 2021 a motion for request stay of execution. The Petitioner's stay has not yet decided in the Court of Appeals.

The District Court granted summary Judgment D.E. 15, to the Respondents on the grounds the Petitioner has not established that the state court's conclusion that counsel's performance was not deficient, and that he was not prejudicial by an deficiency. D.E. 33 at 14; questions about the illegal re-entry offenses was trial counsel's strategy /d, at 15; Petitioner's was not prejudiced by the failure to call witnesses /d at 17; There were no evidence of the prosecutor threatened S.L. to testify /d. 18; Prosecutor questions on convictions were not improper /d. 19; about the drug conviction. As discussed above; about the Prosecutrix remarks on cross-examination on the 4 RR 80-82 "was not familiar with that area of the law?" Please See Appendix E. District Court no argues those remarks on the M&A D.E. 33; That the no party moved for a mistrial;  
6.

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and Petitioner counsel opted not to object or seek a limiting instruction on strategy grounds. *Id.* at 19. That Petitioner's not established that suffered cumulative error that infected the entire trial. *Id.* at 22. The Court of Appeals dismiss for want of jurisdiction without any opportunity Petitioner's seek relief from the operation of the Judgment D.E. 56.

#### REASONS FOR GRANTING THE PETITION

This case present Petitioner's did not understand proper procedures because of language difficulties, e.g., *Oil v. Vazilano* 131 F. Supp. 2d 486, 494 (S.D.N.Y. 2001). D.E. 57 at 3. A fundamental question of the interpretation of this Court's decision in *Williams v. Taylor*, 529 U.S. 362, 146 L. Ed 2d 389, 120 S. Ct. 1495 (2000) at 1499. Reasons exist for the exercise of the Court's discretionary Jurisdiction and is great public importance because it affects Petitioner's and to others similarly situated in all 50 states, the District of Columbia, and hundreds of city and trial courts. In view of the large amount of pro se cases over ineffective assistance of trial and appellate counsel, Prosecutrix misconduct, and trial court error, guidance on the question is also of great importance to Prisoner's, and the ways the decision of the lower court in this case was erroneous.

The issue's importance is enhanced by the fact that the lower court's in this case have seriously misinterpreted *Williams*. This Court held in *Williams* constitutional rights to the effective assistance of

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counsel as defined in *Strickland* [466 U.S. 668], ... was violated, and whether the judgment of the Virginia Supreme Court refusing to set aside his death sentence "was contrary to" or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States within the meaning of 28 U.S.C. § 2254(d)(1) [...]. We answer both questions affirmatively.

The common sense understanding of the not object to the amount Prosecutrix improper questions. Please See Appendix E. 4 RR 56.61. This testimony demonstrates the unfair prejudice such testimony would have on the jurors. Petitioner's testimony during the initial stages of cross examination contained eight references to arrested, eight references to illegally, five references to the feds, four references to felony, and one reference to jail, including the highly prejudicial details of Petitioner's third degree felony offense for the possession of twenty pounds of marijuana, and multiple references to Petitioner's violation federal law. /d.

Petitioner's challenges the admission of Rule 404(b) evidence a trial extraneous offenses was inadmissible under Fed. R. Evid. 404(b) prohibits. That District Court abuse of discretion.

Defense counsel strategy "opened the door to further questioning about the illegal re-entry offenses" M.R.D.E. 33 at 15. S.L. wanted Petitioner's deported out of her life. D.E. 16-10 at 12.  
8.

The common sense about District Court grant certificate only on one issue has discussed above but denied Petitioners habeas corpus about the illegal re-entry offenses. To the contrary, it is clear on record on cross-examination, the Prosecutor, ask [G]anules several questions about the timeline of his arrivals in and removals from the United States, including his prior conviction for illegal re-entry. Please See M&N D.E. 33 at 5, also See Appendix E. Attorney accidentally opened the door to further questioning that is damaging because he has failed to prepare, his conduct cannot be called a strategic choice. See *Strickland*, 466 U.S. at 690.

The District Court erred and abuse of discretion that this testimony was inadmissible under Fed. R. Evid. 404 (b). During cross-examination the court excused the jury and asked counsel to approach. D.E. 70-80. The court asked whether the law had changed regarding questions eliciting the details of prior conviction. *Id.* at 80. Petitioner counsel responded that it had not, but that he did not object because Petitioner's wanted to tell the truth. The court responded that the state was not supposed to go into the details and that the questions could have cause unfair prejudice with the jury because they implied that [C]anules was a drug dealer. *Id.* The prosecutor apologized and stated that she was not familiar with that area of the law. *Id.* at 81. The court state that counsel's failure to object may have

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been ineffective because there was no reason for those details to be in front of the jury. *Id.* The prosecutor state that she would not talk about it any more and agreed to strike the questions from the testimony and have a curative instruction, but Petitioner counsel opted not to do this as it would call greater attention to the testimony *Id.* at 81-82.

*In Washington v. Hofbauer, 228 F. 3d 689 (CA 6 2000), at 703 we find that the trial court's application of Strickland in this case was not simply incorrect, but was objectively unreasonable, meeting even the high threshold required by the AEDPA. The Prosecutor's tactics and challenged statements amounted to unfair and prejudicial misconduct plainly meriting an objection and curative instruction, yet [defense counsel] Weston sat silent. At the most pivotal moments, we conclude, his silence was due to incompetence and ignorance of the law rather than as part of a reasonable trial strategy. [Reversed, writ conditional granted].*

Petitioner's asserts in the transcourse of his claim counsel was ineffective for failing to request the removal of the jurors because jurors had heard damaging testimony. This constitutes a clear deprivation of his rights under the Sixth and Fourteenth Amendments to be tried by an impartial jury. say so.

Trial Judge could have disqualified defense counsel this violated Petitioner's sixth Amendment right to counsel of choice *eg. Wheat, 486 U.S. at 163, 108 S.Ct. 1692*. For abuse of discretion disqualification would be proper on the basis of all information

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known or knowable at the time the Judge acted. 4 RR 80-82.

Second error, *Gideon v. Wainwright*, 372 U.S. 335, 372 (1963), e-2, *Gochicoa v. Johnson*, 53 F. Supp. 2d (W.D. Tex. 1999). As to the medical records, Elena Ermenc Estrada, a forensic child abuse nurse examiner, testified that she examined S.L. after she report the abuse. D.E. 16-10 at 121, 125, 126. After taking S.L.'s history, Estrada conducted a physical examination, including an examination of S.L.'s genitals /d at 127. she found no trauma or anything else abnormal /d at 127-28. Estrada testified "This was not uncommon, as 85 to 95 percent of patients have no physical injuries /d at 130-32. Under the Fed. R. Evid. 801(d). Estrada may refer to tip from she found no trauma or anything else abnormal to show, if those testimonies were not properly authenticated, then they do not qualify as business records and their admission into evidence violates the confrontation clause under Texas Rules of Evidence 803(4). Please see Appendix F.

Third error, witnesses investigation decision no to investigate four alibi witnesses family members (3 son's and wife) under Petitioner's request her counsel, witnesses there were all the time at the house when S.L. fabricate allegation happend. State counsel present a mount of expert witnesses. As noted by counsel for Petitioner's on closing, "You only have my client's word." 4 RR 116. S.L. testified that no one else in the family ever saw Petitioner's do anything to her. D.E. 16-10 at 30, 34, 37-38. In sum, the point  
11.

is this: Constitutionally effective counsel must develop trial strategy in the true sense - not what bear a false label of "strategy" - - based on what investigator. Petitioner's counsel performance fell well on the wrong side of that line. See *Strickland*; 466 U.S. at 690. District Court abuse its discretion by refusing to grant Petitioner's alibi defense, e.g., *Nealy v. Cabanab*, 764 F.2d 1173, 1174 (5th Cir. 1985). Where the state's case consists chiefly or solely upon the word of an accomplice, Illinois court have recognized the great importance to the defendant of evidence of direct contradiction or material corroboration from other sources. See *Montgomery v. Peterson*, 846 F.2d 407 (CA 7 1988).

Fourth error, counsel was infected for failing to object to hearsay throughout the hundreds of pages of medical records the state introduced as evidence (D.E. 16-16 at 12-25). Contained within the reported 815 pages of S.L. medical records (actual 858 pages in reporter's records), labeled at State's exhibit number five, are no less than forty-eight references as documented of sexual abuse, legal victim, please see Appendix F at 16. 7 RR 1-374; 8 RR 1-464. This had the resulting effect of the testimony of at least thirty-eight witnesses testimony being admitted into evidence without the opportunity for Petitioner's to confront and cross examine them in violation of the protection afforded to an accused under the Sixth Amendment and other rules of laws. Fed. R. of Evid. 803(4) admission of S.L. medical records into evidence arguably does not

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meet the exception. 7 RR 1-374; 8 RR 1-464. Please see Appendix E at 17-18. Trial counsel's failure under Fed. Rules of Evid. Rule 103 (2) (1), say so. To object to the admissibility of state's Exhibit Five was clearly deficient certiorari should be granted for abuse of discretion of that Petitioner's had satisfied the *Strickland* prejudice requirement. *Id* at 18-17. e.g., *Gideon v. Wainwright* 372 U.S. 335, 342 (1963).

After all, trial records 4 RR 80-82 shows clear the unfair Prejudice Petitioner's trial. Moreover appellate counsel would have had challenge prosecutrix misconduct neither District Court argues on M&R 33 at 5-6, 17-19. Prosecutrix misconduct was she was not familiar with that area of the law. Prosecutrix may not make material misstatements of law or fact whether Prosecutrix remarks improper violated Petitioner's due process right. 4 RR 80-82. In light of all the evidence. Please see Appendix E at 17, and M&R D.E. 33 at 4. It is more likely than not that no reasonable juror would have convicted Petitioner's. Finally Petitioner's contends he asserts that the trial court, in order to get the proceeding over with. During cross-examination trial judge states "so, anyway" 4 RR 80-82. Convicting petitioner to 20 years in prison. Deviation from a legal rule is "error" unless the rule has been waived. *Olano*, 507 U.S. at 732-33; See e.g. *U.S. v. Iglesias*, 535 F.3d 150, 158 (3d Cir. 2008) ("An error is a '[d]eviation from a legal rule...'") (quoting *Olano*, 507 U.S. at 732-33). Petitioner contend that the cumulative effect of these error

warrant's reversal of his conviction and sustain his words in  
all claims in his § 2254.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Victor H. White pro se

Date: June 22, 2021