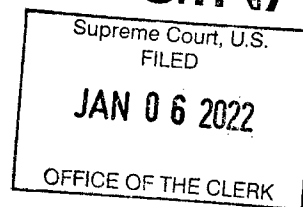


21-6931 ORIGINAL

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



IN THE

SUPREME COURT OF THE UNITED STATES

\_\_\_\_\_  
TOM ILES WHITE III — PETITIONER  
(Your Name)

vs.  
BOBBY LUMPKIN, DIRECTOR  
TEXAS DEPT. CRIM. JUSTICE — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

\_\_\_\_\_  
THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

\_\_\_\_\_  
TOM ILES WHITE III

(Your Name)

Allred Unit #1960343  
2101 F.M. 369 N  
\_\_\_\_\_

(Address)

\_\_\_\_\_  
Iowa Park, Texas 76367

(City, State, Zip Code)

\_\_\_\_\_  
(214) 392-9970

(Phone Number)

## QUESTION(S) PRESENTED

1. When a defendant claims their trial counsel denied them the right to testify in a habeas corpus proceeding, can this claim and a witness' supporting affidavit be overcome by a court applying ineffective assistance of counsel jurisprudence? In other words, did the district court error in applying ineffective assistance of counsel cause and prejudice to Mr. White's claim, that previously this Court has determined to be a structural error?

2. If a structural error, how then does one substantiate a violation of the Constitutional right to testify in a habeas corpus proceeding, when sworn statements, in this case by Mr. White and a witness are disregarded by the district court, in lieu of trial counsel's affidavit, without an evidentiary hearing in the state or federal courts?

## 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

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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 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☒ is unpublished.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 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 \_\_\_\_\_ 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 appears at Appendix \_\_\_\_\_ 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 November 22, 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 \_\_\_\_\_ (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 \_\_\_\_\_.  
A copy of that decision appears at Appendix \_\_\_\_\_.

☐ 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**

### U.S. CONSTITUTION, AMENDMENT V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

### U.S. CONSTITUTION, AMENDMENT VI

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. CONSTITUTION, 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 any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that:

(A) the applicant has exhausted the remedies available in courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the

requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceeding, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that:

(A) the claim relies on:

- (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
- (ii) a factual predicate that could not have been previously discovered through exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that by for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given

to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

## STATEMENT OF THE CASE

Mr. White was convicted of continuous sexual abuse, the predicate offenses of three counts of indecency by contact and one count of indecency by exposure, without any physical evidence supporting the allegations or being allowed to testify in his own defense.

Throughout the trial as misrepresenting statements were made about the evidence favorable to Mr. White, the unfair comments from the prosecutor, and the trial court not allowing the entire police interview of Mr. White to be played, Mr. White determined that he had to testify to correct these misrepresentations and to defend his innocence to the jury. He wrote several notes to trial counsel requesting to testify, and voiced his desire to testify on breaks, which were refused by counsel. The court never asked Mr. White if he wanted to testify; and trial counsel admonished him not to speak out in court. There were witnesses who saw and heard his requests be denied by counsel.

Mr. White appealed his conviction, which was affirmed May 25, 2016. *White v. State*, No. 05-14-01359 (Tex.App.-Dallas 2016); 2016WL3098429. The Texas Court of Criminal Appeals refused his petition for discretionary review on September 28, 2016. *In re White*, PD-0680-16. (Tex. Crim. App. 2016).

Mr. White filed for state habeas corpus relief on November 18, 2016 in the state trial court, the 219th District court of Collin County, Texas (W219-81783-2013-HC1). He was able to raise for

the first time the claim that trial counsel denied his right to testify, among others. One of the persons who witnessed trial counsel denying Mr. White's requests to testify, filed an affidavit in support of his claim. (App. F, p.1). Mr. White also had motioned the state court for an evidentiary hearing (App. F, p.2), but never received a response from the state court.

A different state court, the 199th District court, then on its own issued a "Finding of Fact and Recommendation" (App. E). This document was filed and time stamped by the county clerk on May 8, 2017; and which already had the results of a hearing and the signature of a judge dated 14 days in the future for May 22, 2017. This state court concluded Mr. White "made the ultimate decision not to testify"; and that counsel was "not deficient" because of evidence that would have been admitted. (App. E, p.11). Mr. White objected to the court's findings, showing from the record that trial counsel's answers about "evidence that would have been admitted" was incorrect and disputed by the trial record itself.

In the state court's Finding of Fact (App. E), the court never addresses or mention the witness' affidavit (App. F) in support of Mr. White's claim. The state habeas corpus was denied without written order on the findings of the court without a hearing on June 14, 2017. Ex Parte Tom Iles White III, No. WR-86901-01 (Tex. Court of Crim. App.).

Mr. White then filed a habeas corpus under 28 U.S.C. §2254 in the U.S. District Court for the Eastern Dist. of Texas on February 2, 2018 for this claim and others. He also filed a Motion for and evidentiary hearing in the federal district court to resolve the factual disputes of the conflicting affidavits concerning this claim. The motion was denied on March 17, 2021. (App. C).

Without a hearing on the disputed facts and affidavits, the district court concluded that "Cindy Brown's Affidavit does not undermine trial counsel's assertion that Petitioner ultimately chose not to testify"; and that it was "reasonable strategy" because of evidence that would have been admitted. (App. B, p.24-26). Mr. White objected to these findings. However, the district court denied habeas relief, and sua sponte denied a certificate of appeal on March 19, 2021. (App. B, p.40). United States District Court Cause No. 4:18-CV-86, Tom Iles White III v. Bobby Lumpkin, Director, Texas Dept. Crim. Justice - CID.

A notice of appeal was filed on March 29, 2021, and a Motion for a Certificate of Appealability was filed with the United States Court of Appeals for the Fifth Circuit. On November 22, 2021, the Court of Appeals denied the motion for certificate of appealability. (App. A). United States Court of Appeals for the Fifth Circuit, No. 21-40238. Tom Iles White III v. Bobby Lumpkin, Director, Tex. Dept. of Crim. Justice - CID.

Mr. White's trial was essentially a swearing match between the parties. Except, Mr. White was never allowed to speak due to trial counsel denying his right to testify. The physical evidence, although misrepresented by the state, was favorable to defense and disputed the allegations. There were not any injuries despite alleged multiple assaults; and there was not any DNA evidence per the Texas Department of Public Safety Crime Lab report.

Had Mr. White been allowed to testify, the jury would have been able to gauge the veracity of his denial and his credibility. He could have rebutted the misrepresentations of the evidence, the misrepresentations of his police interview, and the unfair comments by the prosecutor. He could have presented his side of the family history and marital issues. However trial counsel refused his requests to testify, and admonished him not to interrupt the proceedings.

To that end, Mr. White was not allowed to tell the jury his side, or correct the misrepresentations of the state. Without ever having an opportunity to testify against the charges brought against him, he was sentenced to forty years incarceration, thirty years of which is without the possibility of parole.



## REASONS FOR GRANTING THE PETITION

The United States district court's denial (App. B, p.24-26), and subsequently by denying a certificate of appeal (App. A), the Fifth Circuit Court of Appeals has 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 supervising power. And, has decided an important federal question about Mr. White's Constitutional right to testify, and others similiary situated, in a way that conflicts with the relevant decisions of this Court.

The Fifth Circuit Court of Appeals, by denying a certificate of appeal, allowed the district court to deny habeas relief, by applying ineffective assistance of counsel jurisprudence to what this Court has determined to be a structural error of trial counsel denying a defendent the right to testify. (App. B, p.24-26).

This Court in Rock v. Arkansas 483 U.S. 44, 52 (1987); Florida v. Nixon 543 U.S. 175, 187 (2004); and others, as in McCoy v. Louisiana 584 U.S.\_\_\_\_\_(2018), has held that decisions to testify in one's own behalf, despite trial counsel's strategy or recommendation, is reserved for the client. In McCoy Id., this Court reitterated that where client's autonomy and not counsel's competence is in issue, the Court's ineffective assistance of counsel jurisprudence does not apply. That this violation of the Sixth Amendment secured autonomy has been ranked structural

error, and such an error is not subject to harmless-error review.

The district court failed to recognize that trial counsel denying Mr. White the right to testify is a structural error, not subject to harmless-error review or ineffective assistance of counsel jurisprudence. Instead, the district court overcomes this error by contradicting this Court's precedent; and stating that "a court applies the Strickland standard to ineffectiveness claims concerning the right to testify." (App. B, p.24).

The district court then continues to disregard the witness' affidavit supporting Mr. White's claim (App. F, p.1), by concluding "Cindy Brown's affidavit does not undermine Trial counsel's assertion that Petitioner ultimately chose not to testify." (App. B, p.25). Furthermore, that counsel's recommendation can be considered "trial strategy" and that Petitioner fails to show how this prejudiced his right to a fair trial. This finding is directly opposed to this Court's holding in McCoy Id.

The district court's denial and the Fifth Circuit's subsequent denial of review of this claim conflicts with the precedents of this Court. It conflicts with decisions of other Circuit Courts of Appeals, and even conflicts with its own decisions in U.S. v. Mullins 315 F3d 449 (5th Cir. 2002); Jordan v. Hargett 34 F3d310 (5th Cir. 1994); and others.

Furthermore, the district court in denying an evidentiary hearing on the disputing Affidavits (App. C), also ignores this Court's precedent in Townsend v. Sain 372 U.S. 293, 312-313 (1963)

and Williams v. Taylor 529 U.S. 420, 437 (2000), that when there are disputed facts the federal courts in habeas corpus must hold an evidentiary hearing, if the applicant did not receive a full and fair hearing in a state court, either at the time of trial or in a collateral proceeding, and if the Petitioner's diligence is not an issue.

The district court has departed from the accepted and usual course of judicial proceedings and merits this Court's supervisory power to correct on behalf of Mr. White and others similarly situated.

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Also, where a state court decision is "contrary to" or "an unreasonable application of clearly established Federal law," 28 U.S.C. §2254 (d)(2) provides that a state court decision must be reversed, and relief granted if the state court proceeding "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." Miller-El v. Cockrell 537 U.S. 322 (2003).

The evidence from the state habeas proceeding was trial counsel affidavit stating that Mr. White ultimately chose not to testify (App. E, p.11-Line 72), Mr. White's sworn claim that trial counsel denied his right to testify, and a witness' affidavit supporting Mr. White's claim. (App. F, p.1). The state court denied Mr. White's motion for an evidentiary hearing. The decision of the state court to deny this claim was an "unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. §2254 (d)(2).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Tom Iles Dittman

Date: January 3, 2022