

No. 21-7192

ORIGINAL

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

THOMAS Johnny WILKINS — PETITIONER
(Your Name)

vs.

Bobby LUMPKIAL, director — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. COURT of APPEALS for Fifth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Thomas Johnny WILKINS
(Your Name) TDCS No. 2024591

C.T. Terrell UNIT 1300 Fm 655
(Address)

Rosharon, TX 77583-8604
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Does the disagreement between the Circuits on whether New Reliable EVIDENCE for the purpose of Schlup's actual INNOCENCE gateway must be newly discovered, previously unavailable evidence or instead, evidence that was available but not presented at trial call for the exercise of the Supreme Court's supervisory power to secure uniformity in the courts of appeals?
2. Did the court of appeals for the Fifth Circuit disregard Supreme Court precedent when it denied a Certificate of Appealability stating the petitioner had not shown a substantial violation of his Constitutional Rights when a state trial judge forced the petitioner to trial with an attorney with a stated conflict of interest who informed the court he could not adequately defend the defendant?
3. Did a district judge erroneous denial of the defendants writ of habeas corpus and Certificate of Appealability suspend the Supreme Courts rulings in Trevino v Thaler, 133 Sct 1911; Martinez v Ryan, 132 Sct 1309 and Buck v Davis, 137 Sct 759 where defendant showed his claims of ineffective assistance of trial and appellate counsel were substantial and were not time barred because of said cases?

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

• WILKINS v LUMPKIN, No. 6:20-cv-01109, U.S. District Court for the Western District of Texas, Waco Division. Judgment entered

• WILKINS v Lumpkin, No. 21-50177, U.S. Court of Appeals for the Fifth Circuit. Judgment entered

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Texas Rule Criminal Proc. Art 29.06 Continuance

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In the first motion by the defendant for a continuance, it shall be necessary, if the same be on account of the absence of a witness, to state:

1. The name of the witness and his residence....
2. The diligence which has been used to procure...
3. The facts which are expected to be proved by the witness, and it must appear to the Court that they are material.
4. That the witness is not absent by the procurement or consent of the defendant.
5. That the motion is not made for delay.
6. That there is no reasonable expectation that attendance of the witness can be secured during the present term of Court....

Texas R. Evidence

403 Excluding Relevant Evidence for Prejudice, 20
Confusion or other reasons...

Same as Fed R. Evid 403

404 Character Evidence; Crimes and other Acts.

20

(a) Character evidence

Same as Fed R. Evid 404

609 Impeachment by Evidence of a Prior Conviction.

20

(b) Limit on using Evidence after 10 years.
(c) Effect of a Pardon, Annulment or Certificate of Rehabilitation.

Same as Fed R. Evid. 609

OTHER

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R v. Woodard, [1944] K.B. 118, 119 [1944]
FALLER 159, 160

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3 Halsbury's Law of England p 1141,
pp 624-625 (4th ed. 1973)

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. 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 any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall any person be subject 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. Const. Amendment VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy trial and public trial, by an impartial jury of the state and district wherein the crime may have been committed, which district shall have been previously ascertained by law and to be informed of the nature of the accusation; to be confronted with witnesses against him; to have compulsory process for

obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

28§ 2244 Finality of determination
(d)(1) a 1 year period of limitation shall apply to an application for a Writ of habeas corpus by a person in custody pursuant to the judgement of a state court.

28§ 2253 (a)(2) A certificate of Appealability may issue under paragraph only if the applicant has made a substantial showing of the denial of a constitutional right.

28§ 2254 State Custody; remedies in Federal Courts.

(a) The Supreme Court, a Justice thereof, a circuit judge or a district court shall entertain an application for a Writ of Habeas Corpus in behalf of a person in custody pursuant to the judgement 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)(i) 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 the
Courts of the State; or

(B)(1) There is an absence of available
state corrective process, or

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 A 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 December 10, 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: January 06, 2022, 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).

STATEMENT OF THE CASE

On or about December 4, 2020, Mr. Wilkins submitted the motion seeking post-conviction relief pursuant to 28 U.S.C. § 2254 after exhausting his state remedies. His claims were 1) Conflict of interest of trial counsel (2) ineffective assistance of trial counsel (3) ineffective assistance of appellate counsel (4) prosecutor misconduct (5) cumulative error (6) insufficient evidence (8) perjured testimony.

Mr. Wilkins raised very specific grounds for violations of his constitutional rights and identified Supreme Court, 5th Circuit and other circuit cases that proved the violations.

On December 12, 2020 the district court sent a Shew Cause order for a response why the case should not be time barred. Petitioner responded on December 18, 2020 showing under Trevino and Martinez his writ should not be time barred. He had shown where his ineffectiveness of trial and Appellate counsels excluded

his procedural default. He included Fifth Circuit case on Conflict of Interest where the circuit concluded the Conflict of Interest would not be procedurally barred. Petitioner also notified the district court he was innocent of the crime and had medical evidence to prove it and that was being used as a gateway.

On December 24, 2020 the district court denied the application for a Writ of Habeas Corpus and a Certificate of Appealability stating it was time barred. The court indicated the evidence was available at time of trial and was not New Evidence. Had it been in one of the seven Circuits other than the 5th or 3rd or 8th any case would have been heard on merits. The division on the definition of New Evidence needs to be addressed to give defendants in Circuits three, five and eight equal protection under the Constitution as the defendants in the seven other circuits.

On or about March 8, 2021, Mr. Watkins filed a Notice of Appeal from the District Court's denial of the Application for a Writ of Habeas Corpus and a C.O.A., made apart of the Appendix. A- . On or about March 19, 2021 Mr. Watkins filed his Motion for issuance of a Certificate of Appealability in the Fifth Circuit of the United States of appeals. Within his Motion petitioner specified five habeas claims: 1) Conflict of interest 2) ineffective assistance of appellate counsel 3) ineffective assistance of trial counsel 4) prosecutor misconduct and 5) innocence.

On November 18, 2021, the Fifth Circuit Court of Appeals, Judge Jerry Smith, denied the Certificate of Appealability. The Fifth Circuit took 8 months to make that determination. The Judge said the petitioner had not shown any violations of Constitutional violations and his writ application was without merit. The Judge first decided the merits of appeal and then justified his denial of a C.O.A. In essence deciding

an appeal without jurisdiction. The judge could not possibly resolve the merits of the appeal based solely on a Motion seeking a Certificate of Appealability. Petitioner in the motion for a C.O.A. had proven the conflict of interest by submitting a copy of the Motion to Withdraw where counsel stated cause. He also showed the deficient performance of Counsel which caused the Constitutional ineffective assistance of counsel. The Petitioner included a copy of the medical records showing a severe problem with his back.

On or about November 30, 2021, Petitioner filed an extension of time to file a Motion for Rehearing as the denial was dated on November 18, 2021 but not received by the petitioner until November 29, 2021 allowing him only 3 days to file a Motion for rehearing. The Motion for extension of time and his Motion for Rehearing were denied on December 9, 2021. Petitioner asked for a review as the denial came from the

same judge who denied the C.O.A.
The review was denied on January
6, 2022.

Comes now, February 15, 2022 the
Petitioner filing this Writ of Certiorari
with the United States Supreme Court to
have the merits of his Constitutional
violations heard and given a chance
at a fair hearing to prove his
innocence.

REASONS FOR GRANTING THE PETITION

1. Does the disagreement between the Circuits on whether New Reliable Evidence for the purpose of Schlup's actual innocence gateway must be (1) Newly discovered, previously unavailable evidence or instead (2) evidence that was available but not presented at trial call for the exercise of the Supreme Court's supervisory power to secure uniformity in the Courts of Appeal?

A. The disagreement centers on whether "New Reliable evidence" for the purpose of Schlup actual innocence gateway must be Newly discovered, previously unavailable evidence or evidence that was available but not presented at trial. The decision in *Schlup v Delo*, 513 US 298, 327-28, 115 S.Ct. 851, 138 L.Ed.2d 808 (1995) said to be credible, such a claim requires petitioner to support his allegations of Constitutional error with reliable evidence whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence that was not presented at trial. To prove actual innocence, the petitioner must show that in light of the new evidence, no juror, acting reasonably, would have convicted him guilty beyond a reasonable doubt. *Schlup* 513 US at 329. The gateway should open only when a petitioner

presents evidence of innocence so strong that a Court can not have confidence in an outcome of the trial unless the Court is also satisfied that the trial was free from non harmless constitutional error. *McQuissin v Perkins* 569 US 383, 401, 133 S Ct 1924, 185 L Ed 2d 109 (2013) (quoting *Schlup* 513 US at 316)

The point of the actual innocence inquiry is for the federal habeas court to satisfy itself that it should suspend the normal procedural default rule, disregard the important judicial interest of finality and comity, and allow a state prisoner to present his defaulted constitutional claims to a federal court. (see *McCleskey v Zant*, 499 US 467, 490-91, 111 S Ct 1454, 113 L Ed 2d 517 (1991)) The Majority of the Circuits, 1st, 2nd, 4th, 6th, 7th, 9th and 10th, hold new evidence as evidence not presented at trial. However, Circuits 3rd, 5th and 8th hold new evidence as evidence that was not available at trial and only newly discovered.

Therefore a petitioner in Circuits 1, 2, 4, 6, 7, 9 and 10 can have his or her procedural bar excused and have claims heard on the merits. Whereas a petitioner in Circuits 3, 5 and 8 are barred.

B. I am in the 5th Circuit thereby the new

evidence I presented, medical evidence which would have proved my innocence as it would have corroborated the testimony of my defence witness, who was at my residence, that my back was "out". The failure of my defence attorney to obtain and present the evidence was one of the reasons for my ineffective assistance of trial counsel claims. The 5th Circuit had already ruled on an ineffective assistance claim in *Richards v Quarterman*, 566 F3d 853 (5th Cir 2009) where the attorney had failed to obtain defendants' V.A. records and granted him relief. My medical records would have shown I was unable to have committed the assault.

Ten (7) circuits grant petitioners relief when they present evidence not presented at trial while three (3) circuits deny the same relief. This Court must exercise its supervisory power to overcome this disparity and achieve uniformity in our justice system.

2. Did the Court of Appeals for the Fifth Circuit disregard Supreme Court precedent when it denied a Certificate of Appeal ability stating the petitioner had not shown a substantial violation of his Constitutional rights when a state trial judge forced the petitioner to trial with an attorney with a stated Conflict of Interest who informed the court he could not adequately defend the defendant?

A. The Sixth Amendment to the U.S. Constitution guarantees the right to reasonably effective assistance of counsel, which includes the right to conflict free representation. *Cuyler v Sullivan*, 466 US 335, 348-50, 100 S Ct 1708, 64 L Ed 2d 333 (1980) As Justice Brennan stated in *Cuyler*, a defendant, such as in the case at hand, who showed a significant possibility of conflict, should have been entitled to a presumption that his representation in fact suffered. In *Glasser v U.S.*, once the court concluded that Glasser had an actual conflict of interest it refused to indulge in nice calculations as to the amount of prejudice attributable to the conflict. The conflict itself demonstrated a denial of the right to have the effective assistance

of counsel. *Glasser v U.S.* 315 U.S. 60, 76 (1942)

The trial counsel filed a Motion to Withdraw as Counsel on June 10, 2016 and a hearing was heard on July 13, 2016. (Reporter's Record in Appendix B) The motion stated good cause existed as Counsel and moment were unable to communicate and he could not adequately defend the defendant. During the hearing, the counsel stated "an absolute conflict" RR3-6(12), "I truly believe there is a conflict" RR3-6(20), "when there is a conflict that attorney has a duty to advise the Court" RR3-6(22) and "I believe there is an absolute conflict" RR3-21(9). A district court may give substantial weight to defense counsel's representations regarding conflict of interest. *U.S. v Horn* 952 F.2d 190, 195 (8th Cir. 1991). In most cases, it is the defense counsel in a criminal matter who is in the best position professionally and ethically to determine when a conflict exists. *Holloway v Arkansas* 435 U.S. 475, 485, 98 S.Ct. 1173 (1978). The state judge stated it was a tactic of delayers and the District Attorney stated he saw no reason and the judge denied the motion. However, before the hearing he signed an order granting the withdrawal and filed it with the district clerk. (See Order and Motion in Appendix B)

Conflict of interest has been well examined in the Supreme Court, federal circuits and the State of Texas appellate Courts. (See Appendix B) The judges of the Fifth Circuit Court of Appeals have issued opinions on several Conflict of interest cases including a 2012 case, *Sattis v Epps*, 676 F3d 468 where the attorney objected to representation before the trial, as here, and it was sufficient to trigger the trial court's duty to investigate, as in a "Garcia hearing" and as in this case, the trial court failed to investigate adequately, recusal is required.

Petitioner may have failed to make the Court aware of the facts adequately where the Conflict of interest work to defendants' actual and substantial disadvantage by infecting the trial with error of substantial Constitutional rights. 28 USC § 2253(c)(2); *Buck v Davis*, 137 S Ct 759, 773 (2017) & reviewing jurist of reason would find it debatable whether petitioner stated a valid claim of his Constitutional right and that jurist of reason would find it debatable whether the district and appellate courts were correct in its procedural ruling.

The common-law rule, successfully stated

in *R. Woodward*, [1944] KB 118, 119, [1944] 1 ALLER 159, 160 has always been that "No person charged with a criminal offense can have counsel forced upon him against his will." see 3 Halsbury, Law of England § 1141, p 624-25 (4th ed 1973). The holding in *Adams v U.S. ex rel McCraw*, 317 US 268, 279, 87 L Ed 268, 63 S Ct 236 was that "the Constitution does not force a lawyer upon a defendant." In the present case, the state court did exactly that, forced an attorney upon a defendant who had notified the court he wanted a new attorney before trial but was informed since the attorney was appointed, he could not have a new one unless he hired one, which he could not do.

Justice Marshall in *Cuyler* stated the appropriate question under the Sixth Amendment is whether an actual, relevant conflict of interest existed during the proceeding. If it did, the conviction must be reversed. As in *Cuyler v Sullivan*, a conflict was present in this case, an actual conflict of interest negates the unimpaired loyalty a defendant is constitutionally entitled to expect and receive from his attorney.

Justices Brennan and Marshall have stated government in a civilized society must always be accountable for an individual's

imprisonment; if the imprisonment does not conform to the fundamental requirements of law, the individual is entitled to his immediate release.

B. The conflict began when Attorneys would not subpoena a material, out of state, witness, my sister, Mary Durant who lived in Idaho. The attorney would not call her nor accept her cases to discuss her testimony.

When I stated I would file a querece with the State Bar of Texas on my Court appointed attorney and attorney of record (according to clock sheets), his junior partner and son, he became extremely angry and said I would regret ever making that statement.

In the beginning he and his son said I had an excellent chance of proving my innocence and the state could not use a prior conviction which was 29 years old but afterwards "it was get your affairs in order because you are going to prison for the rest of your life and die there." and that the state could and were going to use the prior case.

The errors of counsel were not just isolated but manifold and did indeed prejudice the petitioner and thus denied him of his

Constitutional right to effective Counsel. In *Murray v Carrier*, 106 S.Ct 2639, the Court stated that effective assistance of counsel may in a particular case be violated even by an isolated error by counsel if that error is sufficiently egregious and prejudicial 47745 at 496, citing *U.S. v Cronio*, 466 U.S. at 693-6

The 5th Circuit disregarded the principles guiding the issuance of a C.O.A. *Teward v Dretke*, 542 U.S. 274, 283 (2004) It appears the 5th Circuit side stepped the threshold C.O.A. process by first deciding the merits and then justifying the denial of a C.O.A. based on its adjudication of the actual merits, thereby in essence deciding an appeal without jurisdiction.

Miller-El v Cockrell, 537 U.S. 322 at 336-337 (2003) The Court of Appeals concluded petitioner should be denied a Certificate of Appealability because the appeal was obviously meritless having shown no violation of petitioner's constitutional rights.

Petitioner showed and asserted

convincing claims of ineffective assistance of trial counsel, ineffective assistance of appellate counsel, a conflict of interest of trial counsel, multiple sentences for a single assault and prosecutor misconduct which violated his constitutional rights.

3. Did a district judge erroneous denial of the defendant's Writ of Habeas Corpus and Certificate of Appealability suspend the Supreme Court's rulings in *Trevino v Thaler*, 133 S Ct 1911; *Martinez v Ryan*, 132 S Ct 1309 and *Buck v Davis*, 137 S Ct 759 where defendant proved his claims of ineffective assistance of trial and appellate counsel were substantiated and were not time barred because of said cases?

A. It is useful to recall the historic importance of the Great Writ. The Writ of Habeas Corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action. *Harris v Ables*, 394 US 286, 290-291, 89 S Ct 1082, 1096, 22 L Ed 2d 281 (1969)

The Statutory

mandate to dispose of the matter as law and justice required at least some consideration of the character of the constitutional claim.

Fundamental fairness is central concern of the Writ of Habeas Corpus. Although a Constitutional claim may establish innocence is clearly the most compelling case for habeas review, it is by no means the only type of Constitutional claim that implicates fundamental fairness and that compels review regardless of possible procedural defaults. See *Rose v Lundy*, 455 U.S. 509, 543-44, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982).

A State prisoner may establish cause under Martinez by showing that the defaulted ineffective assistance of trial counsel is substantial and that the counsel in the initial state collateral review proceeding was ineffective. In Trevino it was stated that a substantial claim is one that has some merit, a standard that Martinez Court likened to one that governs the issuance of a COA under 28 U.S.C. § 2253 (a)(2). The petitioner was denied the effective assistance of counsel by virtue of his defense counsel's failure to investigate, develop and present available evidence, interview witnesses or make an effort to retain a expert i.e. Child psychologist.

The petitioner proved his counsel failed to meet the standards required by *Strickland v Washington*, 466 US 668, 104 S Ct 2052, 80 L Ed 2d 674 (1984). This stems from the Sixth Amendment guarantee of the right to reasonably effective assistance of counsel. Counsel had failed to object to the indictment being multiplicitous where the Fifth Circuit has found multiple punishments for the same offense in a single prosecution. The three offenses in this case were for the same victim and alleged, established by a single act.

Multiple sentences for the same criminal offense are barred by the 5th Amendment.

Counsel failed to object even though from September 2012 until May 20, 2016 had been

One Count of Agg. Sexual Assault of a Child. Petitioner had notified Counsel on May 20, 2016 that the state was using the wrong date for the alleged offense. Counsel failed to know the controlling laws of the case and did not adhere to the

requirements of Tex. R. Crim. Proc. Art 29.06 in his Motion for a Continuance as brought to the Court's attention by the district attorney at RR3-9(13-18), RR319(9-14) (see Reporter's Record in Appendix B) Counsel stated This

was his first case with a subsequent connection, yet failed to learn the controlling laws or rules of Criminal Procedure. He did not use Tex. R. Evid 403, 404 or 609(b)(c) to object to introduction of a 29 year old case which was highly prejudicial and was used to inflame the jury. He failed to challenge the prosecutor's improper prejudicial statements as in leastening the credibility of state witnesses, saying defense witnesses were unable to see the truck, hinting they were lying and attacking the character of the defendant.

B. Where as Trial Counsel had informed the Court of a Conflict and he and Petitioner suffered from a breakdown in communication to the degree he could not adequately defend the Petitioner, the court forced him to continue as Counsel. The conflict of interest was obvious from the record (see Reporter's Report Vol. 3 in Appendix B) yet appellate Counsel, E. Alon Bennett failed to raise the established conflict of interest on direct appeal. The appellate Counsel failed whereas the conflict is a violation of the Sixth Amendment and delineated

deficient performance by submitting a "dead-weight winner" even though he may have presented strong but unsuccessful claims on Appeal. see *US v Cook*, 45 F3d 388 (11th Cir) see also *Smith v Robbins* 528 US 259, 285, 120 S Ct 746, 145-2 Ed 2d 756 (2000). Appellate counsel could have also raised a double jeopardy claim and this failure to challenge that issue on appeal amounts to constitutional ineffectiveness.

The petitioner having shown the ineffectiveness of trial and appellate counsel and so stated the issues in his *whit & habeas corpus* at his show cause order and his motion for a Certificate of Appealability should have had his merits heard as required by *Troxend* and *Martinez*.

The heart of this case is the petitioner's claim that he was denied effective assistance of counsel due to an actual conflict of interest that for the ineffectiveness he would have been found innocent.

The petitioner, having shown because of the decisions in *Troxend* and *Martinez*, time hear should have been expended and merits heard.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Thomas Johnny Watkins

Date: 15 February 2022