No. 22-5369

IN THE

SUPREME COURT OF THE UNITED STATES

MILTON LEE GARDNER — PETITIONER
(Your Name)

vs.

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

MILTON LEE GARDNER#1913734
(Your Name)

HUGHES UNIT 3201 FM 929
(Address)

Gatesville, Texas 76597
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1). If the record in this case contains two "written waivers" of counsel, and one request to proceed pro se by counsel, prior to voir dire. But, the record is silent of Faretta admonishments, isn't it Unconstitutional for this conviction to stand?

2). Isn't it unconstitutional for a State Court's Jury Charge to demand the jury to find a defendant guilty of a 1st degree felony based on the elements of a 2nd degree felony, and replace essential elements of a criminal statute with alternative elements not mentioned in that statute?

3). If the Grand Jury Subpoena's a medical record for indictment purposes, & the medical record contained CT-Scans of a person who was not the alleged victim of assault, & the Grand Jury indicts the defendant,& the defendant is convicted. Isn't that unconstitutional?

4). If a prosecution's witness interprets another doctor's x-ray results at trial, & the prosecution ask the jury to consider the x-rays they heard about. Isn't that admitting the x-ray report through live in court testimony, violating confrontation under Bullcomings ?

5). Isn't it unconstitutional for a Federal Habeas Judge, in a Federal Habeas proceeding, regarding a State Petitioner, to argue that the state petitioner's "unadjudicated claim is harmless & deny relief & a Certificate of Appealability, when state did not argue harmless err?

6). Can this court in a certiorari proceeding invoke its jurisdiction under Article III section 2 of the U.S. Constitution to decide:

Isn't it unconstitutional for Texas Family Code section 51.13(d) and Texas Penal Code 12.42(f) to authorize a juvenile adjudication as a final felony conviction to enhance an adult's sentence as habitual when: 1) TX juvenile's records are destroyed after 20 years and 2)juveniles are not morally culpable as adults to be harshly punished in an adult case when the juvenile was not certified as an adult for the juvenile adjudication. ??

LIST OF PARTIES

[X] 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

Gardner v. State, No.10-14-00041-CR, 10th Court Of Appeals TX (8/27/2015) Rehearing denied Dec.3,2015

In re Milton Lee Gardner, PD-0022-16 (Tex.Crim.App. Jan 22,2007 pet.ref'd)

Gardner v. State, No. 16-6656, 137 S.Ct.656 (Jan 9, 2017)

Ex Parte Gardner, WR-43, 847-09 (7/22/2020)

Gardner v. Lumpkin, W-20-CV-772-ADA Denied (8/12/2021)

Gardner v. Lumpkin, No. 21-50846 Denied U.S COA 5th Cir(4/22/2022

In re Milton Gardner, No 22-50215 Denied for WOJ 5th Cir 6/2022

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TABLE OF AUTHORITIES CITED

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

[X] 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,
[X] 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,
[X] is unpublished.

[X] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix C to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the Lower State Appellate court appears at Appendix D to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was April 22, 2022.

[X] 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 Constitutional Amendment 6:

1). Right to Confrontation pursuant to Bullcomings v. New Mexico,564 U.S 647 (2011)

2). Right to Self-Representation pursuant to Faretta v. California, 422 U.S. 806 (1975)

3). Right to effective assistance of counsel pursuant to Strickland v. Washington, 466 U.S. 668 (1984)

U.S Constitutional Amendment 5:

1). Right to Due Process; the prosecution is required to prove beyond a reasonable doubt every element of the crime with which a defendant is charged pursuant to U.S. v. O'Brien, 560 U.S. 218, 224 (2010); In Re Winship, 397 U.S. 358, 364 (1970): Apprendi v. N.J .,530 U.S. 466, 488 (2000)

U.S Constitutional Amendment 14:

1). The government must prove every fact neccessary to constitute a crime.

28 U.S.C § 2253 (c)(3):

1). The U.S. Supreme Court has jurisdiction to review denial of application for a COA by circuit judge or appellate panel because application qualifies as "case" under 28 U.S.C. § 1254(1) See Hohn v. U.S 524 U.S. 236, 241 (1998).

STATEMENT OF THE CASE

Petitioner, Milton Lee Gardner, was charged with the offense of Aggravated Assault under TEX.PEN.CODE § 22.02(a)(1) by police officers. See Complaint & Warrant. Nonetheless, the prosecution alleged that Reindollar and Petitioner was in a dating relationship,that Petitioner caused a serious bodily injury, by striking and or hitting her, and that Petitioner's hands were deadly weapons. The indictment does not state where Petitioner hit Reindollar, or what the serious bodily injury is. See Indictment. Specifically, in regards to the deadly weapon allegation. The indictment alleges "Use or Exhibit" a deadly weapon. The prosecution argues Petitioner was indicted for a 1st degree felony under TEX.PEN.CODE § 22.02(b)(1).("exhibit a deadly - weapon is not in PC 22.02(b)(1)). Reindollar's right mandible was broken in a fist fight in 2002, and as a result of that she has a metal plate at the mentum extending to the right of the midline, and hardware in the body of the right mandible. This occured prior to meeting Petitioner. (5rr98,106-07).Since her surgery but prior to meeting Petitioner, Reindollar testified her jaw would pop and lock when she ate food. (5rr72,98). The two state expert witnesses testified that Reindollar never told them about the popping and locking since her jaw was repaired, but prior to meeting Petitioner. Reindollar did not tell anyone at the hospital about pre-existing symptoms prior to taking x-rays and CT-Scans.

On May 11, 2013 Petitioner and Reindollar entered Wal-Mart par-

REASONS FOR GRANTING THE PETITION

In this case, here I am as a pro se diligent Petitioner. Please construe my filing liberally. The issues in this Petition are very, unpleasant, unfair and goes against every case law you have made if, you do not do something about it NOW... I followed the mandated rules you told me to , but at the point of no return if you do not inforce your own rules. I show throughout the following pages that the 5th Circuit court of appeals isn't paying any attention to the COA's that come through their court. Because they did not follow their very own precedent in Jones v Cain. The said court rejected my COA without any explanation at all, did not even cite El Miller v. Cockrell , nothing.

Your case law told the U.S. Citizens that if a state defendant invokes his right to self-representation, then he is to be admonished. This record is naked of admonishments. Petitioner invoked this right three seperate times in writing and through counsel. The trial court disrespected this constitutional right and manipulated, threathen and convinced a defendant, who had no idea what right he just invoked to change his mind without admonishments, by holding the defendant abandoned his right. How can one abandon a right he doesn't know about?

The HIPPA laws have been violated. The court admitts that a mistake was made.A unknown woman's x-rays appeared in my alleged victims medical records and I'm responsible for her hospital visit? Confrontation issues, the prosecution says the x-rays were inadvertally put in. O.K, but what did the author or hospital say? Who cares? Do you Care? The State and Fed Courts has so far departed from upholding your case law, as to call for your supervisory power.... You must act promptly.

The 11 photos taken by the police and Nurse Anderson,19 pages of Nurse Notes,CT-Scans and x-rays were all combined to be labled Medical Records Of Kimberly Reindollar.

However, A CT-Scan of the head was performed on a person who was not the alleged victim. Parkiview Regional Hospital patient named - Alicia Brown's CT was electronically signed by McKernan, Margaret,MD on May 12, 2013 at 12:40 a.m. (Two hours prior to Reindollar's arrival). Alicia Brown had no connection to this case but two of her CT-Scans of head, due to slurred speech was placed in Reindollar's medical Records on purpose or accident. Neither of the State's witness' signature appeared in the test performed (CT-SCans or X-Rays).(Petitioner will refer to the Medical Records of Reindollar containing Alicia Brown's CT-Scans as "tainted medical records."

II. THE GRAND JURY SUBPOENA'D THE TAINTED MEDICAL RECORDS FOR INDICTMENT PURPOSES

A little over a month later, The Grand Jury subpoena'd the medical records of "Kimberly Reindollar." The medical records contained two CT-Scans of a person who wasn't alleged to have been assaulted by Petitioner, and who was not the alleged victim in this case. The Grand Jury wrote the prosecutor a note requesting to view the medical records to continue the investigation as to rather or not indict Petitioner. A subpoena was issued, and the Grand Jury obtained the tainted record. The Grand Jury returned an indictment based on the TAINTED MEDICAL RECORD.

III. AT TRIAL

State's Expert Wittesses, Dr.Radack,D.O.Hughes, and Nurse Anderson all referenced to the tainted medical report in their hands during their testimony. Dr.Radack at 5rr140-141, D.O.Hughes at 5rr-170, 177, and Nurse Anderson at 4rr41. Drs Radack and Hughes both testified for the State, reviewed the records, made findings and conclusions "based" off the tainted medical record also interpreted what the test found, and meant. See 5rr137-67 For Radack & 5rr168-187 For Hughes. Drs Radack and Hughes submitted testimonial evidence that Dr. Jose Watson, Dr. Jon Engbretson, and Alicia Brown's Doctor, Dr. McKernan, Margret's (Authors of the x-rays) reports showed that Reindollar suffered a "new injury" to the same right mandible,but in a different location than her previous fracture and that it was recently injured. 5rr150,172. Dr. Radack testified about statements contained in the report. He repeated certain inadmissible statements from the report/medical record of Reindollar and Brown. See 148,155,156,159, 161. The statements are not conclusions based on an independent examination of the x-rays.

The State's witnesses Dr. Radack, D.O. Hughes or Nurse Anderson did not have personal knowledge that the test were done correctly or that the tester did not fabricate the results. In closing arguments the prosecutor told the jury to **"think about all the X-Rays they heard about..."** Petitioner did not get any previous or current opportu-

nity to confront or cross-examine the Doctors/Authors who took the CT-Scans and X-Rays to make affirmation of its contents. The State's witnesses were not appropriate surrogate witnesses for cross-examination.

V. HABEAS PROCEEDING

Petitioner, claimed IAC because : 1)Counsel forfeited his right to confrontation by counsel's inaction to insist upon the right to confront the doctors who made the findings grounded in the medical report which prejudiced applicant's defense.

Counsel filed an affidavit asserting that in a medical setting the dictates of Bullcomings v New Mexico does not apply. Both State and Federal Courts held Counsel's affidavit credible and denied relief. And the 5th Circuit Denied a COA.

However, Both State and Federal Habeas Courts and Well as the 5th Circuit Court is in conflict with a recent decision from the 2nd Cir.

1). The decision in this case is in conflict with :
Garlick v. Lee, 1 F. 4th 122 (2nd Cir 2021)

There are a few issues Petitioner "breifly" points out. 1).The 2nd Circuit Court held that introducing the "autopsy" report through the testimony of Dr.Susan Ely of the OCME violated the defendant's confrontation rights under the 6th Amendment because Dr. Ely did not prepare the autopsy report; 2).Even observations of an independent scientist made according to a non-adversarial public duty are testimonial is made in aid of a police investigation or if it were reasonably known th-

at the observations would be available for use at a later trial; 3). because confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well. An analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination and may reveal the **"serious"** deficiencies that have been found in the forensic evidence used in criminal trials. Even scientist testing and expert analysis rely on subjective judgments about which test to perform and how to interpret the results. The exercise of such judgment presents a risk of error that might be explored on cross-examination. See Garlick v. Lee, 1 F.4th 122 (2nd Cir 2021).

Petitioner, claimed his counsel rendered IAC by failing to file a motion to suppress the medical records that were tainted with a person's CT-Scans who was not the alleged victim.

Petitioner's claims of IAC above were denied. **This court needs to exercise its jurisdiction** and decide the conflict. Also, the 5th Circuit's decision to deny a COA is in direct conflict with the following cases:

* Washington v Griffin, 876 F.3d 395 (2nd Cir 2017) (The Supreme Court's holding doesn't have to be exactly on point with the facts, as long as the general rule can equally apply to the case); ("A principle is clearly established Federal Law for § 2254(d)(1) purposes only when it is embodied in a Supreme Court holding, framed at the appropriate level of generality."

* Garlick v. Lee, 1 F.4th 122 (2nd Cir 2021).

2). The medical records discussed above consist of pictures & X-Rays. The pictures were physically admitted, and the x-rays were admitted through testimony. The pictures were admitted to prove the testimony of interpreting the x-rays performed by another doctor true.

The State Habeas Court, Federal Habeas Court, and the Fifth Circuit U.S. Court Of Appeals all denied relief. Upholding the Texas Habeas Court's decision that Petitioner wasn't "prejudiced" under Strickland v. Washington, because counsel's affidavit was credible holding that the medical records "did contain someone elses x-rays" that was not the alleged victim. But, the records were not admitted at trial. And that "calling upon the radiologist made no sense."

The critical point here is:

ARE THE MEDICAL RECORDS TESTIMONIAL STATEMENTS OR DID THE MEDICAL RECORDS CONTAIN TESTIMONIAL STATEMENTS

UNDER BULLCOMINGS V. NEW MEXICO

> The hospital medical records Custodian filed a Sworn Business Record affidavit. Stating that "the medical records of the alleged victim is 33 pages as follows : 21 pages of CT-SCANS,X-RAYS, NOTES AND TEST performed on the alleged victim, Kimberly Reindollar, and 11 pages of photographs taken by police officers and Nurse Anderson.
>
> The prosecutor admitted physically into evidence 11 to 13 photographs from the medical record while questioning the alleged victim regarding each bruise. The prosecutors had their own witnesses interpret the results of CT-Scans and X-Rays of another doctor's report infront the jury under oath. The photos were used to verify that the testimony of the state's witnesses regarding the interpretation of the CT-Scans was true. The state's witnesses formed a expert opinion based on these tainted medical records. Stated the opinion that its a serious bodily injury. And as CT-Scan of the illegal person read; "the alleged victim is slurring her speech, so she can't open her mouth fully to talk, because Petitioner"beat the shit out of her!" (the prosecutor told the jury)... Also, in closing the prosecutor told the jury to "think **about all the x-rays you heard about..."**
>
> (emphasis added) COMPARE Garlick v. Lee

IN THIS ISSUE THE DECISION OF THE U.S COURT OF APPEALS FOR THE FIFTH CIRCUIT IS NOT ONLY ERRONEOUS, BUT IT IS IMPORTANT TO THE ENTIRE NATION TO HAVE THE UNITED STATES SUPREME COURT DECIDE THE QUESTION INVOLVED

Petitioner was indicted and the indictment alleged in part:

" Gardner caused a serious bodily injury by striking and or hitting Reindollar and Gardner did USE or EXHIBIT a deadly weapon to-wit: his hand or hands during the commission of the offense. "

A).

The Prosecutor alleges he charged and indicted Petitioner with a First degree felony (despite the citing of a 3rd degree felony penal code) under Texas Penal Code 22.02(b)(1). See indictment.

However, Petitioner has argued in his state, federal and COA that. Texas Penal Code 22.02(b)(1) does not use the language USE OR EXHIBIT a deadly weapon. But rather, only uses the language "USE A DEADLY weapon." See Texas Penal Code 22.02(b)(1). The trial court's jury charge, charged the jury that"if it finds that Petitioner USED OR EXHIBITED his hands then he is guilty of 1st degree aggravated assault, family violence, with a deadly weapon.

The State Habeas Court "never" addressed the claim and the State court did not argue to the Federal Habeas Court that the error was harmless as the Texas Federal Habeas Court For the Western District found.

B).

In Re Winship, 397 U.S.358,364 (1970)
Apprendi v. N.J., 530 U.S.466,488 (2000)

The burden of proof required for the offense of 1st degree felony assault under Texas Penal Code 22.02(b)(1); the state must prove the element of the offense that" the defendant USED a deadly weapon

during the commission of the assault. Garcia v State, 631 S.W.3d 875; 2021 14th Dist Houston).

1. Texas law recognizes and holds that the meaning of Use and the meaning of Exhibit are NOT synomous or do not have the same meaning

Texas case law in Patterson v State, 769 S.W.2d 938, 941 (TCCA 1989) holds: "Used" a deadly weapon during the commission of the offense means that the deadly weapon was employed or utilized in order to acheive its purpose.... whereas, "exhibited" a deadly weapon means that the weapon was consciously shown or displayed during the commission of the offense. (Petitioner's hands are not deadly weapons, he is not a proffessional athlete or fighter). See also Safian v State, 543 S.W.3d 216, 223 (TCCA 2018) (the deterrance rationale of the D.W. finding works only if the actor makes a conscious decision to use... the weapon to assist in commiting the felony).

2. This Court must decide this case & not allow a State Court or Prosecutor to replace or use alternative meaning to essential elements that establish a crime....

For example: the murder statute uses the essential element "Intentionally." But, the court charges the jury to convict if they find that he intentionally or carelessly ... Exhibit is not mentioned in the 1st degree felony assault statute. See Tex Pen Code 22.02(b)(1). Petitioner's Due Process Rights under the Fifth Amendment were violated because the prosecution is required to prove beyond a reasonable doubt every element of the crime with which the defendant is charged. In Re Winship, 397 U.S.358, 364 (1970). By allowing the jury to convict Pe-

titioner of a crime that carries a sentence of 5-99 years or Life, based on the elements of a crime that carries a sentence of 2-20 years in prison (the 2nd degree felony assault statute states use or exhibit - 22.02(a)(2)) is lessening the prosecution's burden of proof. The reasonable doubt requirement applies to elements that distinguish a more serious crime from a less serious one, as well as those elements that distinguish criminal from non-criminal conduct under Apprendi v. N.J., 530 U.S. 466, 488-92 (2000).

This matter has went beyond just Texas. Texas overlooked this argument so, there wasn't an adjudication on the merits of this claim. The State Attorney General's response to this claim when raised in the Federal Habeas section 2254 was that Petitioner failed to exhaust his state remedies. Petitioner rebutted. The Federal District Court found Petitioner did exhaust the claim, addressed the merits of the claim an despite the state's failure to argue harmless err, concluded the claim was "harmless." Also, not worthy of a COA. The 5th Circuit denied a COA.

It happens on a regular basis that Texas Appellate Courts cite unpublished opinions in their opinions. This case however,unpublished, will be used to others similarly situated in many ways. 1) State Courts can replace or use alternatives in place of elements writen in a statute; 2)the federal court can argue harmless error, even when the state waived the argument by failing to raise it to the federal court; 3) The federal court can decide a claim, never adjudicated by the state and still accord the state AEDPA deference.

A. ISSUE: The 5th Circuit found that the state waived the harmless error argument, because the State did not raise harmless error in its response to Jone's pro se habeas petition.
The state did not raise harmless error argument in its response to my pro se habeas petition but I was denied relief and a COA without explanation.

CASE: * Jones v. Cain, 600 F.3d 527, 540-41 (5th Cir 2010)

ISSUE: A state waives or at least forfeited the harmless error defense by failing to raise harmless error in federal habeas court.

CASES FROM OTHER FEDERAL COURTS IN DIRECT CONFLICT WITH THE DECISION IN THIS CASE REGARDING A FEDERAL DISTRICT COURT ASSERTING HARMLESS ERROR EVEN THOUGH THE STATE HAD WAIVED THE ISSUE IN THE HABEAS CASE.

CASES:* Miller v. Stovall, 608 F.3d 913, 926 (6th Cir 2010)

Sanders v. Cotton, 398 F.3d 572, 582 (7th Cir.2005)

Lam v.Kelchner, 304 F.3d 256, 269-70 (3rd Cir 2002)

Inthavong v.Lamarque, 420 F.3d 1055 (9th Cir 2005)

Gabow v. Deuth, 302 F.Supp.2d 687, 706-07 (W.D. Ky.2004)

ISSUE: The Federal Court used the wrong standard of review making their decision unconstitutional

CASE: * Olu Rhodes v. Michael A. Dittman, 903 F.3d 646 (7th Cir 2018) (Procedural rules apply to the government as well) (Review under interest of Justice - must be certainly harmless)

ISSUE: A state may not distinguish between similar offenses that have different maximum penalties without requiring the prosecution to prove beyond a reasonable doubt the facts that distinguish the two offenses.

CASE: * Apprendi v. N.J., 530 U.S. 466, 488-92 (2000) (requiring proof that defendant's crime was racially motivated to support increased hate-crime sentence.)

A DEFENDANT IN A STATE CRIMINAL TRIAL HAS A CONSTITUTIONAL RIGHT TO PROCEED WITHOUT COUNSEL WHEN HE VOLUNTARILY & INTELIGENTLY ELECTS TO DO SO. Faretta v. California, 422 U.S 806 (6/30/1975)

Petitioner filed two seperate hand written waivers of counsel requesting self-representation. And counsel filed a "Motion to Withdraw", requesting self-representation. See Motion in Appendix F. Counsel stated in her motion that she was unable to adequately represent Petitioner. The trial Judge harshly told Petitioner that she was not giving Petitioner 10 days to prepare if counsel withdrew. That, Petitioner would start on his own voir dire now. Petitioner was given two options 1)proceed with counsel who has said in her motion she cannot represent Petitioner; or 2)proceed with no time to prepare his own defense. Petitioner chose counsel. There is a hand written request attached to counsel's motion.

There are three waivers of counsel, requesting self-representation. All three made prior to voir dire. But, there are "zero" admonishments regarding Faretta v. California. Since the trial court did not explain to Petitioner his rights to self representation, nor admonished him regarding the Dangers & Disadvantages of self reprentation, Petitioner chose, against his will to proceed with counsel. Petitioner was convicted. On Direct Appeal, Counsel emphasised on the subject that "How can Petitioner abandon a right he wasn't made aware of?" The record evidences Petitioner was never made known that he invoked a constitutional right. Petitioner didn't even have a clue of what he had just done. Both High & Low State Court denied relief, Certiorari was denied,Federal Habeas §2254 re-

lief was denied. Finally, Petitioner filed a Motion For a Certificate Of Appealabilty and the U.S Court Of Appeals for the 5th circuit denied Petitioner's Motion for Certificate Of Appealability. Each and every avenue Petitioner took. Petitioner claimed that the record contains three written waivers of counsel, requesting to proceed pro se and the trial court erroneously denied Petitioner his right to self representation.

CASES FROM OTHER STATE & FEDERAL COURT IN DIRECT CONFLICT WITH THE DECISION IN THIS CASE REGARDING THE SELF-REPRESENTATION ISSUES IN THIS CASE.

FED COURTS

A. ISSUE: The statement that Petitioner would not receive additional time to prepare rendered his decision to decline self-representation involuntary.

CASE * United States v. Lawrence, 605 F.2d 1321, 1324 (4th Cir. 1979)

* Thomas v. Commonwealth, 539 S.E.2d 79, 82, 784 (Va.2000)

* U. S v Farias, 618 F.3d 1049, 1053, 1054 (9th Cir. 2010) (time to (prepare must be honored).

B. ISSUE: Minimum actions required of a defendant in order to assert the right to self-representation to the trial court, which then must conduct the requisite inquiry into the waiver of the right to counsel... must do no more than state his request, either orally or in writing.

CASE * Stano v Dugger at 143 [9] 921 F.2d 1125 (11th Cir 1991)

STATE COURTS

A.ISSUE: The trial court was obligated to conduct an inquiry to determine if Petitioner was knowingly and intelligently waiving his right to counsel and is "aware of the dangers and disadvantages of self-representation." Faretta,422 U.S at 835.

CASE * State v Todd, 332 P.3d 887, 891-92 (Or.Ct.App-2014)

* Kirkham v State, 509 N.E.2d 890, 892 (Ind.Ct. app-1987) (trial court's duty to establish a record regarding dangers & disadvantages)

Texas Family Code art 51.13(d) holds; If a defendant in a criminal matter was adjudicated for a felony offense, while the defendant was a minor/juvenile and committed to the Texas Juvenile Justice Department for the offense after 1996, then said adjudication is a final felony conviction to enhance an adult or juvenile's sentence.

Texas Penal Code art 12.42(f) holds; if a defendant in a criminal matter was adjudicated for a felony offense, while the defendant was a minor/juvenile and committed to the Texas Juvenile Justice Department for the offense on or after January 1, 1996, then said adjudication is a final felony conviction to enhance an adult or juvenile's sentence.

TEXAS FAMILY CODE 51.13(d) and TEXAS PENAL CODE 12.42(f) IS UNCONSTITUTIONAL AND IS A VIOLATION OF THE 8th AMENDMENT OF THE U.S. CONSTITUTION

Petitioner was convicted of a first degree felony, and the State used an eighteen year old juvenile adjudication to enhance his first adult felony to Repeat Offender, increasing his sentence from 5 to 99 years or life, to 15 to 99 years or life. After Petitioner attempted to challenge his juvenile adjudication, By way of Habeas steaming from Art. 5, §8 of the Texas Constitution. Reasoning, that is the only way to challenge the juvenile adjudication. The state claimed or asserted the Doctrine of Laches. Claiming that Petitioner waited eighteen years to challenge his Juvenile Adjudication and that the juvenile record had been destroyed. Petitioner argued that

the State had waited 18 years to use the juvenile adjudication and 18 years later he suffers restraints of liberty because of such. Petitioner's Habeas was denied. Nine years later Petitioner wrote the Juvenile Justice Department and asked for the title of the offense for which he was committed to the TJJD for. The Justice Department responded by letter and informed Petitioner he was commited for a class A misdemeanor and further told Petitioner that after 20 years from a juvenile's discharge all juvenile records are destroyed. Petitioner considers hisself lucky.

The Two Texas Statutes Petitioner asserts are unconstitutional can be used to enhance an adult sentence up to 25to Life.

The Supreme Court has recognized that persons who commit crimes while they are under 18 years of age are not as morally culpable as similarly disposed adult offenders, and prohibited the imposition of the death penalty on juvenile offenders, regardless of the heinousness of their crimes. Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 1194 (2005). In this case Petitioner was 15 years old and was falsely accused by the prosecution of being adjudicated for the 3rd degree felony offense of simple assault on a public servant by clawing him.

(The clawing of the police officer was not a intentionally or knowing act, but had happened during the officer's physical restraint of the minor (Petitioner) when Petitioner attempted to flee from the officer.) In Graham v. Florida, 130 S.Ct.2011, 176 L.Ed. 2d 825 (2010). Writing for a 5-to-4 majority, Justice Anthony Kennedy called life with-

out parole an "especially harsh punishment" for a juvenile and said that while state's may be permitted to keep young offenders locked up, they must give defendants "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Thanks to this Honorable Court juvenile offenders cannot receive a life - (LWOP) for non-murder offenses.

In Petitioner's case, Kennedy's rationale can be applied. Reasoning a 33 year old male at the time of trial, faced at most a 5-99 year prison sentence. Petitioner, had never as an adult been convicted of any felony of the 1st,2nd, or 3rd degree, and had no history of violence. Had his sentenced enhanced by use of a juvenile adjudication alleging he committed a felony while he was 15 years old. In addition, his entire juvenile history, including child abuse, alleged attempts to escape custody, was used against him in a punishment phase and Petitioner was sentenced to an aggravated 60 year prison sentence. Which in Texas Petitioner would be 64 years old before he would even be interviewed for a chance to parole. The juvenile adjudication raised his original sentence from 5-99 to 15-99, and the use of the juvenile history was admitted into evidence and the prosecution asked the jury to return a life sentence.

BEING PUNISHED FOR A JUVENILE ADJUDICATION WHEN YOU ARE AN ADULT IS CRUEL AND UNUSUAL PUNISHMENT

Throughout the punishment phase the prosecution expounded the Petioner's juvenile troubles, lies and acusations, assumptions and the likes were made. One of the prosecutors concluded stating, The juve-

nile system couldn't help him, TYC didn't change him, show him we have had enough of him...

In regards to Petitioner's juvenile history there are mitigating factors that exists that made me less culpable than a similarly situated adult, such as growing up very poor and getting sent to juvie for stealing a pair of name brand tennis shoes, psychological issues ,difficulties, and substance abuse issues or any other factor[s] that would reduce culpability.

However, these unconstitutional statutes do not afford an adult an opportunity regarding mitigating evidence before using the juvenile adjudication as a final felony conviction.

In this case, neither crime was a homicide/murder. Petitioner stood trial as a 33 year old black male for hitting his 31 year old white female girlfriend, because he allegly thought she was cheating on him. The juvenile adjudication was an alleged 3rd degree simple assault on a public servant.[1]

CRITICAL REASONS THIS COURT MUST DECIDE THIS QUESTION

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1). A juvenile adjudication (according to TX law) is a civil proceeding and the provisions of the TEX.CODE OF CRIMINAL PROCEDURE, inclu-

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1. Petitioner has new evidence that he was not committed to a youth center for the crime the prosecutor alleged "a felony" but was commited for unlawfully carrying a knife. "a misdemeanor," see TEX.PEN.CODE . 46.02

ding the procedures relating to habeas corpus, do not normally apply to juvenile adjudications. Vasquez v. State,739 S.W.2d 37, 42 (Tex.Crim.App.1987). But see Ex parte Valle, 104 S.W.3d 888, (Tex.Crim.-App.2003). However, this law only applies to benifit the state's prosecutors. Reasoning, The prosecutors use a juvenile adjudication as a "final felony conviction," to enhance a criminal offense; the prosecutors used a criminal adult standard of latches pursuant to adult criminal case law in Ex parte Perez,398 S.W.3d 206, 216 (2013) to deny a juvenile habeas writ relief. See Ex parte Gardner, 10th COA (TX)# 10-15-00372-CV and Texas Supreme Court# 17-0150.

2). A 15 year old juvenile is not morally culpable as similarly disposed adult offenders. And Texas PenCode 12.42(f) and Texas Family Code 51.13(d) which allows a juvenile non-homicide or homicide crime to be a final felony conviction to enhance an adult sentence (regardless of the age of the adult) is criminalizing "wholly passive" or "essentially innocent" conduct. Which this court has held that **"the government cannot criminalize. Lambert v. California, 355 U.S.225 (1957)**

3). Per agency policy, The Texas Juvenile Justice Department retain records for juvenile offenders for 20 years after the youth is discharged from the Texas Juvenile Justice Department (TJJD).

Like the case at bar, this is inflicting harsher punishment on juveniles than adults. Reasoning, if a juvenile at the age of 16 was discharged in 1998, then the record is destroyed in 2018.

The prosecutors pursuant to Tex Pen Code 12.42(f) or Tex Fam Code 51.13(d) allege the now 37 year old adult of committing a murder in 1996 over 20 years ago, and provides a few documents in a clerk's file to the jury, and the adult is enhanced and given a life sentence. The adult, by agency policy do not have access to the juvenile records because they were destroyed and a criminal adult defendant cannot rely on the prosecution to give him evidence of possible "prosecutorial misconduct."

Similar if the adult relies on the juvenile probation department or district clerk records. There is no solid evidence of commitment to TJJD, and the crime for which you were commited for, other that the TJJD's records which could be destroyed. In addition, the prosecution's use of a 18 year old juvenile adjudication cannot really be challenged, far as the juvenile adjudication itself, because as demonstrated above the prosecutor will claim latches.

These are a few reasons that the [statutes] in question are unconstitional. Last, and arguably more importantly, the use of the juvenile adjudication after 1996 as a final felony conviction could be a death sentence, or a lWOP sentence based on a juvenile convicted of a non-murder offense. Reasoning, the said juvenile offense is a final felony conviction for enhancement purposes. so, a sentence may be enhanced to Habitual Offender and a 41 year old today could be given 50 to 99 years which in Texas 50 years and up must serve 30 calender years before discretionary parole is consi-

dered. Meaning that 41 year old will see parole when he is 71 years old, if he isn't killed in prison by dangerous heat conditions or dangerous criminals. For these reasons I believe this is one of the questions this court must address. The youth are our future, and criminalizing "essentially innocent" conduct of a child who a great line of Supreme Court Precedents have ruled is less culpable than a similarly situated adult is Cruel and Unusual Punishment under the Eight Amendment Of the United States Constitution.

CONFLICTING CASES WITH THIS DECISION

ISSUE: Texas law conflicts with its own law in this matter, specifically, Ex pare Valle holds that juvenile proceedings are on the Civil side not criminal. Then Texas Pen Code 12.42(f) & Texas Family Code 51.13(d) calls a juvenile offense a criminal felony conviction and allows it to be used in an adult crimnal matter

CASE:
* Ex parte Valle, 104 S.W.3d 888, (TCCA 2003)
* Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 1194 (2005)
* Graham v. Florida, 130 S.Ct.2011, 176 L.Ed. 2d 825 (2010)
* Miller v. Alabama, 132 S.Ct.2455; 183 L.Ed. 2d 407 (June 25,2012)
* Montgomery v. Louisiana, 136 S.Ct. 718 (2016)
* Jones v. Mississippi, 141 S.Ct. 1307 (2021)
* Staples v. United States, 571 U.S. 600 (1994) (Mens rea is the rule to CJ)
* Lambert v. California, 355 U.S. 225 (1957) (the government cannot criminalize Wholly passive or essentially innocent conduct)

TEXAS FAMILY CODE SECTION 51.13 ADDRESSES THE EFFECT OF AN JUVENILE ADJUDICATION OR DISPOSITION

The Juvenile Justice Code is found in Title 3 of the Texas Family Code, Chapter 51 includes a wide range of general provisions, including such topics as jurisdiction, waiver of rights, and polygraph examinations . Texas Family Code § 51.04, 09151 (West). Section 51.13 addresses the effect of an juvenile adjudication or disposition.

In particular, subsection (a) provides that an ORDER of Adjudication or disposition is not a conviction of a crime and does not disqualify a child in any civil service application or appointment , (c) prohibits a child from being committed or transferred to a penal institution or other facility that is used primarily to execute the sentences of persons convicted of a crime; AND * (d) allows adjudcications to be used as a "Final Felony Conviction," in adult cases, especially the Habitual Offender Statute. These statutes are Subsection (a),(b),(c)(1) and (e) of Texas Penal Code Section 12.42.

TEXAS PENAL CODE 12.42 (f) GIVES THE PROSECUTION AUTHORITY TO USE A JUVENILE ADJUDICATION AS A FINAL FELONY CONVICTION

A juvenile adjudication after 1/1/1996 of a felony offense in which the juvenile was adjudicated under Tex.Fam.Code §54.03 and committed to the Texas Juvenile Justice Department under Tex. Fam.Code § 54.04, is a final felony conviction for subsection a,b,c-1 and e.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: 7-15-2022