

Cause No.

22-5642

ORIGINAL

**In The
Supreme Court of the United States**

Supreme Court, U.S.
FILED

AUG 30 2022

OFFICE OF THE CLERK

Lonnie Kade Welsh,

Petitioner

versus

Gary Maddox Sheriff Of Lamb County; Bobby Lumpkin, Director, Texas
Department of Criminal Justice, Correctional Institutions Division,

Respondents

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit
Writ Of Habeas Corpus
Consolidated Cases Fifth Circuit Cause Nos.
21-50709, 21-50711, 21-50712

PETITION FOR A WRIT OF CERTIORARI

Petitioner: Lonnie Kade Welsh
2600 South Sunset Ave.
Littlefield, Tx 79339

Respondents: Gary Maddox
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Questions Presented

Lonnie Kade Welsh was convicted as a sex offender in three separate cases. He challenged his convictions under actual innocence based upon new evidence. the evidence was not received by him until weeks before he discharged the prison sentence. He then presented the evidence to the state trial court and to the Texas Court of Criminal Appeals. After it was declined he moved in the Western District of Texas under 28 U.S.C. § 2241. However, the district court viewed the claim under 28 U.S.C. 2254 and did not issue a ruling on the merits of the case. The district court claimed Welsh was not in custody pursuant to the criminal judgment. Petitioner appealed to the United States of Appeals for the Fifth Circuit. The Fifth Circuit refused to issue a Certificate of Appealability claiming the issue did not have an arguable basis in law. The questions presented for review are:

1. Is A Person In Custody For The Purpose Of Either 28 U.S.C. § 2241 or 28 U.S.C. § 2254 If The Individual Is Still Under A Direct Consequence From The Criminal Judgment And Does The Suppression Clause Protect The Right To File The Writ Of Habeas Corpus?
2. Is A Person In Custody For The Purpose Of Either 28 U.S.C. § 2241 or 28 U.S.C. § 2254 If The Collateral Disabilities Can Only Be Set Aside If The Conviction Is Overturned And Does The Suppression Clause Protect The Right To File The Writ Of Habeas Corpus?
3. Does A Person Reach A Non-Frivolous Question For The Purpose Of A Certificate Of Appealability If Another Court Has Decided The Same Issue Favorably?

List Of Parties

1. Bobby Lumpkin Director Texas Department of Criminal Justice
2. Gary Maddox Sherriff Lamb Count Texas
3. Lonnie Kade Welsh petitioner for writ of habeas corpus

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Opinion Below

1. The State of Texas 198th District Court Kerr County Texas, In re Lonnie Kade Welsh, Cause Number B1002, Writ Of Habeas Corpus , Decided December 26, 2019
2. The State of Texas 210th District Court Kerr County Texas, In re Lonnie Kade Welsh Cause Number A06-490, Writ Of Habeas Corpus, Decided December 30 2019.
3. The State of Texas 178th District Court Bexar County Texas, In re Lonnie Kade Welsh, Cause Number 2010CR12730 Writ Of Habeas Corpus, Decided January 6, 2020.
4. The United States Supreme Court, Lonnie Kade Welsh v. The State of Texas Cause Number 20-5163 , 208 L Ed 2d 114, Writ Of Habeas Corpus , Decided October 5, 2020.
5. The United States Supreme Court, Lonnie Kade Welsh v. The State of Texas Cause Number 20-5164 , 208 L Ed 2d 114, Writ Of Habeas Corpus , Decided October 5, 2020.
6. The United States Supreme Court, Lonnie Kade Welsh v. The State of Texas Cause Number 20-5165 , 208 L Ed 2d 114, Writ Of Habeas Corpus , Decided October 5, 2020.
7. Federal District Court for the Western District of Texas San Antonio Division, Lonnie Kade Welsh v. Bobby Lumpkin, 5:21-CV-562 Writ Of Habeas Corpus Decided September 30, 2021.

8. Federal District Court for the Western District of Texas San Antonio Division, Lonnie Kade Welsh v. Bobby Lumpkin, Writ Of Habeas Corpus 5:21-CV-547 Decided September 30, 2021.

9. United States District Court for the Western District of Texas San Antonio Division, Lonnie Kade Welsh v. Bobby Lumpkin, 5:21-CV-548 Writ Of Habeas Corpus Decided September 30, 2021.

10. United States Court of Appeals for the Fifth Circuit, Lonnie Kade Welsh v. Bobby Lumpkin, Cause Number 21-50709, 21-50711, and 21-50712, Writ Of Habeas Corpus Decided March 9, 2022.

11. United States Court of Appeals for the Fifth Circuit Lonnie Kade Welsh v. Bobby Lumpkin, Cause Number 21-50709, 21-50711, and 21-50712, Petition For Rehearing En Banc June 6th 2022.

Jurisdiction

The opinion for the Fifth Circuit decided cause number 21-50709, 21-50711, and 21-50712 on 9th day of March, 2022. Petitioner did file for en banc reconsideration which no member of the panel or judge in regular active service voted to hear the causes on 7th day of June 2022.

The petition for writ of certiorari is timely filed within 90 days under United States Supreme Court Rule 13(1). This Court's jurisdiction is extended under

statutory authority 28 U.S.C. § 1254, which allows discretionary jurisdiction from a decision of the United States Court of Appeals.

Constitution And Statutory Provisions Involved

28 U.S.C. 2241

28 U.S.C. 2254

Texas Health and Safety Code 841.003(a)

United States Constitutional Article I, § 9, cl. 2

United States Constitutional Fourteenth Amendment § 1 Procedural Due Process Clause

Reasons For Granting The Writ Of Certiorari

Petitioner respectfully prays the Court grants this Writ of Certiorari to review the judgment of the United States Fifth Circuit Court of Appeals, to bring conformity within the Constitutional law as this case deals with issues that are contrary to this courts prior opinion, contrary to the Fifth Circuit's own precedents, issues that the Federal Circuits are split upon, and a novel question of Constitutional law that should be answered in the first instance by this court.

Additionally, petitioner prays for justice as he is being denied the Constitution by the Fifth Circuit refusal to follow its own precedent case law.

I. Statement Of The Case

On or about February 6, 2020 the Texas Supreme Court denied the writ of habeas corpus in three separate criminal convictions challenged for actual innocence. The United States Supreme Court denied the writ of certiorari in the three writs. Subsequently petitioner brought the writ via 28 U.S.C. 2241 against Sheriff Maddox of Lamb County Texas the place of Confinement of Lonnie Kade Welsh in three separate writs.

The District Court for the Western District of Texas changed the writ from 28 U.S.C. 2241 against Sheriff Gary Maddox to 28 U.S.C. 2254 naming Bobby Lumpkin the director of Texas Department of Criminal Justice as the individual who has Lonnie Kade Welsh confined. The district court denied the writ stating Welsh was not confined for the purpose of the writ due to Welsh discharging his sentence. Therefore the court did not have jurisdiction to hear the writ.

However, the Western District claimed it did not have jurisdiction to hear the petition due to Lonnie Kade Welsh no longer being in custody under the state

sentence. Welsh appealed the denial of the writ to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit consolidated all three cases and dismissed the writ.

The Fifth Circuit declined to issue a Certificate of Appealability (henceforth COA) claiming Welsh's writ of habeas corpus is without merit because he is not in custody pursuant to his criminal sentence. Welsh then filed for a petition for rehearing en banc pointing to (1) the circuit split between the Fifth Circuit and the Federal Court Of Appeals for the Third Circuit; then (2) how the denial for COA was contrary to the Fifth Circuits opinion; (3) how the denial of COA was contrary to this court's opinion; and (4) how the constitution of the United States Suspension Clause entitles him to the power of the writ.

II. Issues Presented

Issue One: Another Court of Reasonable Authority Have Found The Issue Debatable And Has Determined That Under Similar Circumstances

The Fifth Circuit panel decision denied a Certificate Of Appealabilty using the standard under *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) "The issue becomes somewhat more complicated where, as here, the district court dismisses

the petition based on procedural grounds. We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.”

The case is a Writ of Habeas Corpus either under 28 U.S.C. § 2241 or 28 U.S.C. § 2254. The central question is Welsh in custody for the purpose of the writ that challenges his prior sex crimes.

The Federal Third Circuit Court of Appeals have resolved to find that sex offender registration requirements are a direct consequence to the criminal conviction and is in custody for the purpose of habeas corpus relief. This is directly contrary to the Fifth Circuit ruling that Welsh is not in custody for the purpose of habeas relief. See *Piasecki v. Court of Common Pleas, Bucks County*, PA 917 F.3d 167 (3rd Cir. 2019).

The collateral consequences rule has its origins in *Brady v. United States*, 397 U.S. 742 (1970). In *Brady*, the Supreme Court ruled that a plea of guilty will not be found to be unknowing and involuntary in the absence of proof that the defendant was not advised of, or did not understand, the direct consequences of his

plea. 397 U.S. at 755 (1970) (emphasis added). A direct consequence is one that has a "definite, immediate, and largely automatic" effect on the range of the defendant's punishment. *Cuthrell v. Director, Patuxent Inst.*, 475 F.2d 1364, 1366 (4th Cir.), cert. denied, 414 U.S. 1005 (1973).

Therefore, the requirements under the law of this circuit is that a COA is to issue by "demonstrating that his application involves issues that are debatable among jurist of reason, that another court could resolve the issues differently, or that the issues are suitable enough to deserve encouragement to proceed further." *Hernandez v. Johnson* 213 F.3d 243, 248 (5th Cir. 2017); See *Barefoot v. Estelle*, 463 U.S. 880 , 893 n.4 (1984) overruled on other grounds by *Lindh v. Murphy*, 521 U.S. 320, (1997).

This standard, articulated in *Barefoot v. Estelle*, 463 U.S. supra at N.4, permits appeal where petitioner can "demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [differently]; or that the questions are adequate to deserve encouragement to proceed further." (internal quotation marks and citations omitted). Followed by *Jennings v. Woodford*, 290 F.3d 1006, 1010 (9th Cir. 2002); *Stuart V. Gagnon* 837 F.2d 289, 291 (7th Cir. 1987); *Flieger v. Delo* 16 F.3d 878, 883 (8th Cir. 1994).

The reasonable jurist question is fulfilled by the Third Circuit opinion.

Therefore, the lower federal circuit courts are split upon the issue and Certiorari in this case should be issued to resolve the circuit split.

Issue Two: Sex Offender Registration Is A Direct Consequence Of The Criminal Trial Sentence and The Panel Decision Is Contrary To United States Supreme Court Opinion, Fifth Circuit Opinion, an Other Circuit Opinion

The requirement to register as a sex offender in the State of Texas is a direct consequence to the criminal charge. See *Anderson v. State* 182 S.W.3d 914, 918 (Tex.Crim.App. 2006) (holding “The registration requirement for persons who are convicted of sex offenses is a direct consequence.”).

The Fifth Circuit opinion in *Port v. Heard* 764 F.2d 423 (5th Cir. 1985), is contrary to the denial of COA as the Fifth Circuit finding that the sex offender registration requirement for the purpose of the writ is a collateral consequence to his conviction and not in custody, therefore the Fifth Circuit panel decision not to grant the COA is clearly wrong. See *id.* at 427 (“However, the firmer ground on which to place the decision is that a fine, as a direct consequence of the contempt convictions, preserves the Port’s stake in the merits of the appeal they bring before us, despite their release from custody. Since the Ports are still threatened with a direct consequence of the convictions, the collateral consequences doctrine of *Carafes v. LaVallee* 391 U.S. 234, 238 (1968) is not implicated.”); See also *id.* at

434 (holding “ We do not presume to review Texas ‘interpretation of its own law particularly where the edicts of that state’s highest court are concerned.’”)(quoting Seaton v. Procunier, 750 F.2d 366, 368 (5th Cir. 1985))(citing Moreno v. Estell 717 F.2d 171, 179 (5th Cir. 1983), cert. denied sub. Nom., Moreno v. McKakle 104 S.Ct 2353).

Additional, besides the decision not to grant the COA split from the Fifth’s Circuit prior opinion upholding the denial of COA is contrary to the United States Supreme Court opinion of the determination of the custody requirements when the State of Texas has determined that the registration requirements for sex offenders are a direct consequence of the conviction. See. Estelle v. McGuire; 502 U.S. 62, 67-68(1991) (“Today, we reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. “)

The Supreme Court Should Grant Certiorari for the reasons stated above.

Issue Three: The Determination That Welsh is Not In Custody Under The Civil Commitment Law To Attack The Criminal Sentence For The Purpose Of Writ Of Habeas Corpus Is Contrary To The United States Supreme Court Precedents

Welsh challenged the use of the criminal conviction to civilly commit him under Texas Health and Safety Code 841.003(a). This circuit has stated that Welsh can challenge his civil commitment through a Writ of Habeas Corpus. See Rubio v.

Davis, 907 F.3d 860, 861–63 (5th Cir. 2018) (petitioner, who was “civilly committed for an indefinite period of time” as “sexually violent predator” and thereafter was “convicted of a state felony for failure to comply with sex offender registration requirements” and incarcerated, was “ ‘in custody’ under the civil commitment order” and could challenge that order even though petitioner was “serving his criminal sentence” when federal habeas corpus petition was filed, “[b]ecause it is undisputed that Rubio will be civilly committed upon the completion of his criminal sentence”). See *Ambrose v. Roeckeman*, 749 F.3d 615, 616 (7th Cir. 2014) (considering on the merits the habeas petition of a petitioner challenging his civil commitment under the Illinois Sexually Dangerous Persons Act).

Moreover, the criminal conviction is used to impose the civil commitment confinement. Therefore, a petitioner challenging a current sentence as enhanced by an allegedly invalid prior conviction satisfies the 'custody' requirement of § 2254 even though the sentence imposed for the prior conviction has expired. See *Maleng v. Cook*, 490 U.S. 488, 493 (1989) ; See also *Martin v. Deuth*, 298 F.3d 669, 671 (7th Cir. 2002).

In other words *Maleng* holds that when sentence A has expired but has been used to augment sentence B, the prisoner is "in custody" only on sentence B. The consequences of sentence A for sentence B do not yield continued "custody" on

sentence A, the Court concluded. However, a person in custody on sentence B may contend that that custody violates the Constitution if it was augmented because of an invalid sentence A. ... Whether the federal court with jurisdiction over the custodian holding the prisoner on sentence B may inquire into the validity of sentence A is a matter of comity and the rules of preclusion, not of "custody."

The Fifth Circuit in this case would, therefore, have jurisdiction to consider Welsh's petition "if it were construed as an attack on his current civil custody civil confinement being analogous to 'sentence B' in the above hypothetical." *Stanbridge v. Scott* 791 F.3d 715, 721 (7th Cir. 2015).

The evidence of actual innocence was not obtained until October 14, 2015 and released from prison on November 3, 2015. Therefore, Welsh had plead the exception to the rule as the civil commitment of Welsh was the first time that he was able to challenge the conviction. Under the *Lackawanna County District Attorney v. Coss*, 532 U.S. 394,406 (2001) exception were the was "habeas petition directed at the enhanced sentence may effectively be the first and only forum available for review of the prior conviction."

The Chief Justice Roberts, with whom Justice Scalia, Justice Thomas, and Justice Alito joined, dissenting in *Boumediene v. Bush*, 553 U.S. 723, 813 (2008) stated "But habeas is, as the majority acknowledges, a flexible remedy rather than a substantive right. Its 'precise application . . . change[s] depending

upon the circumstances.’ The shape of habeas review ultimately depends on the nature of the rights a petitioner may assert.”)(cleaned-up) (citing *Reid v. Covert*, 354 U.S. 1, 75 (1957), (Harlan, J., concurring in result) (“[T]he question of which specific safeguards of the Constitution are appropriately to be applied in a particular context . . . can be reduced to the issue of what process is 'due' a defendant in the particular circumstances of a particular case”))).

The denial of COA is contrary to United States Supreme Court precedents and likewise created a circuit split upon the ability to challenge a civil commitment that used a criminal sentence to impose the commitment. Therefore, the Supreme Court Should Grant Certiorari for the reasons stated above.

Issue Four: The Suspension Clause Protects Applicant Right To File The Writ

The Suspension Clause of the United States Constitution Art. I Sec. 9 should allow a path for relief through the great writ. No other relief at law can be granted as the relief from the direct consequence of the criminal sentence is precluded due to the State of Texas refusing to produce the evidence that petitioner now argues

shows his actual innocence. This kind of de facto preclusion of the evidence due to its late discovery is what Art I, Sec. 9 of the constitution was meant to protect.

The United States Supreme Court would hold the Writ to be protected. Even though Welsh is no longer in physical custody of the sentence. There are other restrictions upon his freedom. See *Justice of Boston Mun. Court v. Lydon* 466 U.S. 294, 300(1984); See also *Jones v Cunningham*, 371 US 236, 243, (1963)(“It is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose-the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.”).

Historically, it was enough to show “that besides physical restraints on a man’s liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the insurance of habeas corpus.” *Jones supra* 371 U.S. at 240. See also *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294 (1984).

The common law as it existed at the time of the founding would consider Welsh liberty impaired. *Boumediene v. Bush*, 553 U.S. 723,779(2008); See also *Dep’t of Homeland Sec. v. Thuraissigiam* 140 S.Ct. 1959, 1969 (2020) (citing *I.N.S. v. St. Cyr* 533 U.S. 289, 301(2001)).

The restrictions upon Welsh's liberty are similar to that found in *Jones v. Cunningham* 371 U.S. 236, 240 for the purpose of registration. See also *Hensley v. Mun. Court, San Jose- Milpitas Judicial Dist.* 411 U.S. 343, 351.

Though the requirements to register is a direct consequence imposed by the court. See *Brady v. United States* 397 U.S. 742, 755(1970); See also *Conn. Dep't of Public Safety v. Doe* 538 U.S. 1, 6-8 (2003). Collateral Consequences imposed by law as been enough to evoke the power of the writ. See *Spencer v. Kemna*, 523 U.S. 1, 7-9 (1998).

Likewise, this Fifth Circuit has found "Procedural due process challenges fail because conviction of a sex offense entails all requisite process for the state to impose sex-offender conditions." *Doe v. Abbot* 945 F.3d 307, 311 (5th Cir. 2019) (citing *Conn. Dep't of Pub. Safety v. Doe (CDPS)*, 538 U.S. 1, 6-8;.

Furthermore, the restraints on liberty suffice to satisfy the "in custody" requirement in other context that are less sever than civil commitment and similar to sex offender registration requirements. See *Lewis v. Randle*, 36 F. App'x 779, 2002 WL 343397, at *1 (6th Cir. 2002) (unpublished); *McVeigh v. Smith*, 872 F.2d 725,,727 (stayed one-year probation sentence sufficed for "in custody" requirement); *Chaker v. Crogan*, 428 F.3d 1215, 1219 (9th Cir. 2005); *Lee v. Stickman*, 357 F.3d 338, 342 (3d Cir. 2004) (citing *Mabry v. Johnson*, 467 U.S. 504, 507 n.3, 104 S. Ct. 2543, 81 L. Ed. 2d 437 (1984)); *Olson v. Hart*, 965 F.2d

940, 942-43 (10th Cir. 1992); *Tinder v. Paula*, 725 F.2d 801, 803 (1st Cir. 1984); *Duvallon v. Florida*, 691 F.2d 483, 485 (11th Cir. 1982); *Williamson v. Gregoire*, 151 F.3d 1180, 1183 (9th Cir. 1998); *Barry v. Bergen County Prob. Dep't*, 128 F.3d 152, 159-62 (3d Cir. 1997) ("an individual who is required to be in a certain place--or in one of several places--to attend meetings or to perform services, is clearly subject to restraints on his liberty not shared by the public generally"). Together, probation and an onerous community service requirement imposes significant restraints on liberty. In addition, should Lawrence have violated the terms of his probation or community service, the court could revoke his probation and incarcerate him.

These case show that restriction on liberty even minimal restriction is enough to evoke the writ. Given this the holding in "Once the convict's sentence has expired, however, some concrete and continuing injury other than the now-ended incarceration or parole-some "collateral consequence" of the conviction-must exist if the suit is to be maintained." *Spencer v. Kemna*, 523 U.S. 1,7 (1998). Where overturning the criminal sentence would provide relief from "concrete injury, caused by the conviction and redressable by invalidation of the conviction." *Id* at 1-2.

The Constitution requires "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety

may require it.” U.S. Const. Art. I, § 9, cl. 2. The relief pursued “is not now and never has been a static, narrow, formalistic, remedy; [but that] its scope has grown to achieve its high purpose- the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.” Jones supra 371 U.S. at 243.

The Supreme Court should grant certiorari for the reasons stated above to settle the reach of Art. I Sec. 9 of the United States Constitution and determine what restraints on an individuals liberty meet the requirement to have present the great writ upon his behalf to ensure liberty.

VIII. Prayer

Wherefore, premise is considered, petitioner prays that the Court grants the writ of certiorari to consider the questions put forth and resolve the conflicting areas of law.

Respectfully Submitted, /s/ Lonnie Kade Welsh
2600 South Sunset Ave.
Littlefield, Tx 79339

IV. Certificate Of Compliance

I Lonnie Kade Welsh do hereby certify under the penalty of perjury in accordance with 28 U. S. C. § 1746 that the foregoing complies with the word limit requirements under the Petition For document prepared under Rule 33.1 the document is less than 9,000 words because, excluding the parts of the document exempted by United States Supreme Court Rule 33.1. This document complies with the typeface requirements of and the type-style requirements of Fed. R. App. and using Word 2010 word counter the document is _____.

V. Certificate Of Service

I Lonnie Kade Welsh do hereby certify that a true and correct copy of the foregoing has been served upon respondents by placing the same postage prepaid with the United States Postal Service to:

Garry Maddox
Sheriff Lamb County
2600 South Sunset Ave.
Littlefield, Tx 79339

Booby Lumpkin
Region Director Texas Department of Criminal Justice
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