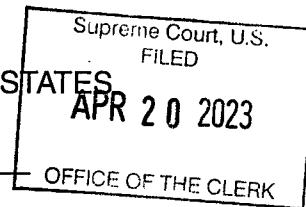


No. 22-7343

IN THE
SUPREME COURT OF THE UNITED STATES



WILLIAM LEVI OLIVER — PETITIONER
(Your Name)

vs.

STATE OF TEXAS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

TEXAS COURT OF CRIMINAL APPEALS

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

William Levi Oliver #2290434

(Your Name)

Robertson Unit, 12071 F.M. 3522

(Address)

Abilene, Texas 79601

(City, State, Zip Code)

N/A

(Phone Number)

QUESTION(S) PRESENTED

- 1 (a) Whether it is a violation of the Confrontation Clause to dispense with physical, face-to-face confrontation and permit out-of-state testimony via videoconference upon the mere inconvenience to a witness required to travel to appear in court?
- 1 (b) and, if so, whether it is ineffective assistance of trial counsel for failing to object under the Confrontation Clause to such out-of-state testimony via videoconference?
- 2 Whether it is ineffective assistance of trial counsel for failing to object to testimony concerning the truthfulness of complainant when witness testified that he believed the complainant's allegations because "she's never lied to me before"?
- 3 Whether it is ineffective assistance of trial counsel for failing to object to the expert testimony that implicitly bolstered the truthfulness of complainant's allegations via her "trauma-narrative" and diagnosis of Post-Traumatic Stress Disorder?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

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DENIAL WITHOUT WRITTEN ORDER

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ 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☐ is unpublished.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 _____ to the petition and is

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

☒ For cases from **state courts**:

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

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

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

1.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ 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 Feb 8th, 2023.
A copy of that decision appears at Appendix A.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment to the United States Constitution

- CONFRONTATION CLAUSE

REASONS FOR GRANTING THE PETITION

- 1 (a) Whether it is a violation of the Confrontation Clause to dispense with physical, face-to-face confrontation and permit out-of-state testimony via videoconference upon mere inconvenience to a witness required to travel to appear in court?
- 1 (b) and, if so, whether it is ineffective assistance of trial counsel for failing to object under the Confrontation Clause to such out-of-state testimony via videoconference?

The Texas Courts have decided an important federal question in a way that conflicts with the relevant decisions of this Court [RULE 10(c)].

To wit: Crawford v. Washington, 541 U.S. 36 (2004); Coy v. Iowa, 487 U.S. 1012 (1988); and Melendez-Dias v. Massachusetts, 557 U.S. 305 (2009).

The issue presented poses a significant issue of public importance precisely because testimony via videoconference has become increasingly common since the onset of COVID, and although the events in this case pre-date the pandemic, the issue is relevant to the preservation of Confrontation rights post-pandemic and in the digital era.

During trial, two witnesses from out-of-state testified via videoconference. These witnesses were:

- * Pam Kelly - Executive Director of St. Clair Children's Advocacy Center, Pell City, Alabama (8 R.R. 5); and,
- * Kasi Freeman - Therapist/Counselor at the Child Advocacy Center, St. Clair County, called 'The Children's Place' (8 R.R. 53)

The alleged reason given by Pam Kelly as to why neither could travel to Texas for Petitioner's trial was that they were a small operation and traveling to Texas would have shut down the center and left no services for the children there (8 R.R. 6).

Trial counsel did not object to these testimonies via videoconference under the Confrontation Clause. As such, there was no error preserved for appellate review.

On Direct Appeal, appellate counsel alleged that the "trial court committed fundamental error in allowing State expert witness Pam Kelly and Kasi Freeman to testify from the State of Alabama by videoconference".

However the Court of Appeals affirmed Applicant's conviction because he "did not object at trial to either of these witnesses testifying by videoconference" and that he "does not cite, and our research does not reveal, any authority sgifting responsibility to a trial court for a defendant's failure to object to the presentation of witness testimony by videoconference and allowing a defendant to raise a Confrontation Clause complaint for the first time on appeal".

The Court of Appeals concluded that because Petitioner "failed to raise his Confrontation Clause complaint with the District Court, he has failed to preserve it for our review".

Petitioner asserts that had trial counsel objected under the Confrontation Clause to the testimony via videoconference of Pam Kelly and Kasi Freeman, he would have been successful in at least one of the following three:

1. Trial Judge would have sustained objection and rendered the video-conference testimony inadmissible;
2. Direct Appeal would have reveiewed Confrontation Clause claim and granted relief; or,
3. Court of Criminal Appeals would have granted Discretionary Review and/or reversed his conviction in light of Haggard v. State, 612 S.W.3d 318 (Tex. Crim. App. 2020).

The Court of Criminal Appeals opinion in Haggard shows that had counsel objected, Petitioner would have received relief.

Haggard was decided 28 days after the denial of Petitioner's PDR, and is materially indistinguishable from petitioner's case - except Petitioner's counsel failed to object and preserve the error.

The issue in Haggard was whether the Confrontation Clause was violated when the trial court allowed a SANE Nurse to testify against Haggard from Montana using a two-way video system. The Court of Criminal Appeals concluded that it did violate the Confrontation Clause.

When considering whether the reasons given by the SANE Nurse were sufficient to dispense with physical, face-to-face confrontation, the Court held that "traveling to appear in court and testify can be frustrating and difficult for various reasons: finances, hectic schedules, health issues, sheer distance ect. But the right to physical, face-to-face confrontation lies at the core of the Confrontation Clause, and cannot be so readily dispensed with based on mere inconvenience to a witness".

The rationale for this conclusion was based upon this Court's opinions in Crawford v. Washington, 541 U.S. 36 (2004) and Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009), in that "live testimony in court subject to adversarial testing" is the foundation of the Confrontation Clause because the witness who has fabricated her account may "under oath in open court, reconsider [her] false testimony".

There was nothing in the present case preventing Pam Kelly and Kasi Freeman from traveling to Texas to testify beyond mere inconvenience.

Pam Kelly testified that they were "a very small operation", and although she claimed it would have shut down the center, it is not likely that the short period that it would take to travel to Texas would have caused an issue beyond scheduling. Presumably, employees at the center are entitled to take vacation time - yet such does not cause a complete shutdown of the center that would harm the services they provide. Therefore, a trip to Texas was a matter of scheduling and the justification used by Kelly is disingenuous.

Furthermore, Kasi Freeman testified that a number of her sessions with the complainant was for "court prep" (8 R.R. 105). This unequivocally shows that Freeman knew in advance that this case would likely go to trial and she would need to travel to Texas to testify.

Premises considered, there is no reason in this case to dispense with physical, face-to-face confrontation of Pam Kelly and Kasi Freeman. Therefore, had counsel objected under the Confrontation Clause, Petitioner would have received relief. Petitioner was thus prejudiced by counsel's deficient performance because there is a reasonable probability that the result of the trial would have been different without the testimony of Kelly and Freeman.

The Trial Court made findings that counsel was abiding by his client's strategic choice by not requesting a continuance to ensure the live testimony of Pam Kelly and Kasi Freeman.

Petitioner objected to this finding, and argued that he did not consent to waive his rights under the Confrontation Clause in deciding to go to trial as scheduled and not ask for a continuance.

Petitioner advanced the argument that Kelly and Freeman were State witnesses adverse to Petitioner. The State knew of, and agreed to, the date of trial. It was the States duty to secure the live testimony of its witnesses. Petitioner was under no obligation to request a continuance to aid the State because they failed to secure the live testimony of Kelly and Freeman. Petitioner's prerogative should always be presumed to protect his Constitutional rights - not to flippantly waive them to the advantage of the State. If the State needed a continuance, to produce the live testimony of its witnesses for reasons beyond their control, Petitioner argued, then they had the option to request a continuance for those reasons. They chose not to.

Therefore, it could not be reasonably construed that Petitioner made a "strategic choice" to allow Kelly and Freeman to testify remotely, and subsequently waive his rights under the Confrontation Clause - when there is absolutely no strategic value to defense by doing so.

Furthermore, the Trial Court held that counsel's affidavit explained that: "knowing how Judge Fancy Jerek was going to rule in his discretion" concerning the Confrontation issue, he did not object. So counsel's express reason why he did not object was based upon the judge's inevitable denial of said objection - not the so-called "strategic choice" of Petitioner.

Petitioner also objected to this reasoning because this too was not sound trial strategy because whether or not to object to a violation of a defendants constitutional rights should never be premised upon the propensity of the judge. Counsel's failure to object waived that issue for appellate review. In light of the Texas Court of Criminal Appeals decision in Haggard, Petitioner would have succeeded on appeal irrespective of the trial judge's propensity to deny such claims.

Regardless, the trial court recommended the denial of Habeas relief, and the Texas Court of Criminal Appeal denied Petitioner's Habeas Corpus without written order.

2. Whether it is ineffective assistance of trial counsel for failing to object to testimony concerning the truthfulness of complainant when witness testified that he believed the complainant's allegations because "she's never lied to me before"?

The Texas Courts have decided an important federal question in a way that conflicts with the relevant decisions of this Court [RULE 10(c)].

To wit: Strickland v. Washington, 466 U.S. 668 (1984).

This issue presented poses a significant issue of public importance because guidance from this Court will go a long way to ensure the constitutional integrity of criminal proceedings in regards to permitting witnesses testify regarding the truthfulness of the complainant.

Jerry Brown is the uncle of the complainant. During direct examination the following transpired:

Q. Okay. And did you ask her [complainant] whether or not she had ever told anybody before?

A. [Jerry Brown] I did, and she said, counselor. She told her mother. And she asked me, why didn't her mama believe her?

Q. Okay.

A. And I can't answer that for --

Q. And so at that point, did you recollect back to that phone call that you had with your sister?

A. I did.

Q. And your sister had told you [complainant] was lying?

A. Correct. Yes, ma'am.

Q. So no you have your sister saying one thing and your niece saying the other?

A. Yes, ma'am.

Q. You're related to both?

A. Yes, ma'am.

Q. What were you thinking at that point?

A. I'm torn between the two. I love them both, they're family. And I have to go with the child.

Q. Why do you believe [complainant]?

A. Why would -- she's never lied to me before.

Q. She's never lied to you?

A. Never about anything, even if she's taken a little piece of bubble gum from me, I would ask her and she would say, yes, I took it. Never lied.

Q. She's never lied to you?

A. No, ma'am, never, not once.

(7 R.R. 124-125)

Jerry Brown impermissibly bolstered the truthfulness of complainant by testifying that he believed the complainant's allegations because "she's never lied to me before". By doing so, Jerry Brown testified as to a matter within the ambit of the jury's duty. The complainant had not been impeached and Brown's opinion did not help the jury to clearly understand the witness's testimony, nor assist the determination of a fact in issue. It merely bolstered the truthfulness of complainant.

Counsel failed to object to the testimony of Jerry Brown in regards to his opinion as to the truthfulness of complainant and her allegations. There is no conceivable strategy or tactic that would justify allowing this kind of testimony in front of a jury. Therefore, Petitioner received ineffective assistance of trial counsel and was subsequently prejudiced by such deficient performance because there was relatively little inculpatory evidence other than the testimony of complainant and there is a reasonable probability that the jury's verdict rested on the credibility of complainant. Had counsel objected to this testimony, there is a reasonable probability the outcome of the trial would have been different.

3. Whether it is ineffective assistance of trial counsel for failing to object to the expert testimony that implicitly bolstered the truthfulness of complainant's allegations via her "trauma-narrative" and diagnosis of Post-Traumatic Stress Disorder?

The Texas Courts have decided an important federal question in a way that conflicts with the decisions of this Court [RULE 10(c)].

To wit: Strickland v. Washington, 466 U.S. 668 (1984).

This issue presented poses a significant issue of public importance because guidance from this Court will go a long way to ensure the constitutional integrity of criminal proceedings in regards to permitting witnesses testify regarding the truthfulness of the complainant.

During trial, the Therapist/Counselor Kasi Freeman, testified that her "assessment determined that [the complainant] meets the criteria for post-traumatic stress disorder" (8 R.R. 60) and thus treated her with "Trauma Focus Cognitive Behavior Therapy" (8 R.R. 64). She then went on to testify that "part of

trauma symptoms is self-sabotage, self-destructive behavior... There were a couple of other instances where she [complainant] would just do destructive behavior, and that's just very common with children that have been sexually abused or gone through trauma" (8 R.R. 66).

A large portion of Freeman's testimony was also dedicated to repeating complainant's "trauma-narrative" (8 R.R. 105).

Such testimony implicitly bolstered the truthfulness of complainant's allegations because in order to be diagnosed with PTSD or to have a "trauma-narrative" the allegations for which constitute the basis of the trauma must be presumed to be true.

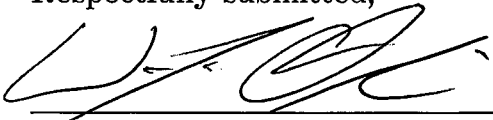
When a therapist/counselor states to the jury that the child has been diagnosed with PTSD due to sexual abuse, it implicitly decides an issue within the ambit of the jury's duty - to wit, whether or not the alleged abuse occurred. The same is true to any "trauma-narrative". There simply can be no narrative unless the alleged trauma from the sexual abuse is presumed to have occurred.

Counsel failed to object to this testimony by Kasi Freeman in regards to her opinion as to the truthfulness of complainant and her allegations. There is no conceivable strategy or tactic that would justify allowing this kind of implicit testimony in front of the jury. Therefore, Petitioner received ineffective assistance of trial counsel and was subsequently prejudiced by such deficient performance because there was relatively little inculpatory evidence other than the testimony of the complainant and there is a reasonable probability that the jury's verdict rested on the credibility of the complainant. Had counsel objected to this testimony, there is a reasonable probability the outcome of the trial would have been different.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,


A handwritten signature in black ink, appearing to be 'J. A. ...', is written over a horizontal line.

Date: 12th April 2023