

22-75420 ORIGINAL
No.

IN THE SUPREME COURT
OF THE UNITED STATES

FILED
MAY 03 2023
OFFICE OF THE CLERK SUPREME COURT, U.S.

Wilber Johnson - pro se petitioner

VS

The State of Texas - Respondent(s)

ON PETITION FOR A WRIT OF CERTIORARI TO
Texas Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

Wilber Johnson

2665 Prison Rd #1

Lovelady, Tx 75851

Oral Argument Not Requested

Question Presented

Whether testimony can be sufficient to render harmless any error in admitting additional testimony and evidence, when trial counsel objected to testimony and when the record suggests testimony was not properly admitted and violate due process, the confrontation clause under both the United States and Texas Constitution, in addition to due course of law.

List of Parties

1. Petitioner

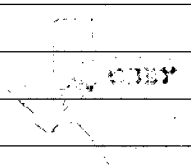
Wilber Johnson
TDCJ #02354519
Wainwright Unit
2665 Prison Rd #1
Lovelady, Tx 75811

2. Respondent(s) on appeal for the State.

Clint Morgan
Texas Bar No. 24071454
Harris County District Attorney's Office
500 Jefferson St. Ste 600
Houston, Tx 77002

Kim Ogg
- District Attorney of Harris County

Janna Oswald and Edward Appelbaum
- Assistant District Attorneys at trial



Related Cases

- Johnson v. State, NO. 14-21-00465-CR, NO. 14-21-00466-CR, Court of Appeals of Texas, Fourteenth District, Houston. Judgment entered November 3, 2022.
- Johnson v State, PD-0673-22, Court of Criminal Appeals of Texas. Judgment entered February 8, 2023.

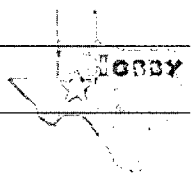


Table of Authorities cited

- Accord United States v. Orrico page #7
599 F.2d 113, 119 (6th Cir. 1979)
 - Allen v. Illinois page #8
397 U.S. 337, 338, 90 S.Ct. 1057, 25 L.Ed. 2d 353 (1970)
 - Allien v State of Louisiana Page #7
366 So.2d 1308, 1312 (La. 1978)
 - Allison v. United States Page #6
409 F.2d 445, 1969 U.S. App Lexis 8900, 133 U.S. App D.C. 159 (D.C. circuit February 17, 1969)
 - Coronado v. State, Page #9
351 S.W.3d 315, 325 (Tex. Crim. App. 2011)
 - Hughes v. State, Page #5
625 S.W.2d 827
 - Moore v. State of Florida Page #7
485 So.2d 1279, 1281 (Fla. 1986)
 - O'Mary v State, Page #5
139 Tex. Crim. 294, 139 S.W.2d 800
 - Villalon v. State Page #6
739 S.W.2d 450
-

Statutes and Rules

- Tex. R. App 33.1 page #8
- Federal Constitution Art. 1.10 cl 1 page #5, 6

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Appendix A - Decision of State Court of Appeals

Appendix B - Decision of Court of Criminal Appeals

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI
OPINIONS BELOW

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

☐ For cases from state courts:

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

☐ reported at _____; or

☐ has been designated for publication but is not yet reported; or

☒ is unpublished.

The opinion of the Fourteenth District court appears at Appendix A to the petition and is

☐ reported at _____

☐ has been designated for publication but is not yet reported; or

☒ is unpublished.

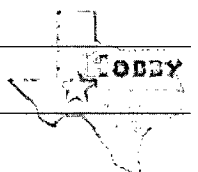
JURISDICTION

[] For cases from state courts:

The date on which the highest state court decided my case was February 8, 2023.

A copy of that decision appears at Appendix B.

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



Constitutional and Statutory Provisions Involved

- State of Texas violated Petitioner Sixth and Fourteenth amendment rights by (1) admitting into evidence testimony from improper outery witness (2) by admitting into evidence the testimony from a witness who did not conduct forensic interview of child. Error were preserved by alerting the trial court to the constitutional complaint, Tex. R. App 33.1.

- Retrospective application of Texas Statutory provision allowing alleged sexual offense victim's uncorroborated testimony support conviction held to violate Federal Constitution Art 110 c12.

Statement of the Case

On March 11, 2016 Wilber Curtis Johnson was indicted for two counts of aggravated sexual assault: one for intentionally and knowingly causing the penetration of Z.G.'s¹ sexual organ with his finger and one for intentionally and knowingly causing Z.G.'s sexual organ to come into contact with his mouth. On August 11, the trial court found Johnson guilty as charged. On August 16, 2021, the trial court sentenced Johnson to 25 years in prison for each charge to run concurrently. On November 3, 2022, the Fourteenth Court of Appeals issued its memorandum opinion affirming the trial court's judgments.

¹To protect the identity of the complainant in this case, she is referred to here in as Z.G.

Grounds for Relief

With respect to both charges the state case at trial was extremely erroneous. Had the trial court found Lisa Bourgoyne and Carolyn Lamb testimony in violation of petitioner Sixth Amendment and Federal Constitution Art 1.10 cl 2, it is likely the trial court would not have found petitioner guilty of either charge.

For evidence to constitute proof beyond a reasonable doubt, (1) the State must show that the offense was actually committed and (2) the proof must amount to a degree of certainty greater than a mere possibility or a strong suspicion that defendant committed the offense. *O'Mary v. State*, 139 Tex. Crim. 294, 139 S.W.2d 800; *Hughes v. State*, 625 S.W. 2d 827. The complainant was not asked whether penetration of her sexual organ occurred by Carolyn Lamb or by Lisa Bourgoyne nor did she volunteer that it did at trial. The complainant testified that she told her mother first about the alleged sexual assault. The State refused to allow mother to participate in the outcry hearing even though the mother and complainant testimonies corroborate each others. The complainant also testified the petitioner

A certified question was asked to the Supreme Court in Florida and Louisiana: Is a prior inconsistent statement sufficient evidence to sustain a conviction when a prior consistent statement is the only substantive evidence of guilt?

The Supreme Court of Florida answering a certified question concluded: We agree that the risk of convicting an innocent accused is simply too great when a conviction is based entirely on prior inconsistent statements.

Moore v. State of Florida 485 So.2d 1279, 1281 (Fla. 1986)
Accord United States v. Orrico, 599 F.2d 113, 119 (6th Cir. 1979)

The Supreme Court of Louisiana wrote: We thus hold that unobjected to hearsay which is the exclusive evidence of a defendant's guilt of the crime or an essential element thereof, and where contradicted at trial by the sworn recantation of the out-of-court declarant is no evidence at all.

Allien v. State of Louisiana, 366 So.2d 1308, 1312 (La. 1978)

Furthermore, Petitioner was denied the right of confrontation due to the fact that a witness could not be located. Lisa Bourgoyne did not conduct the forensic interview nor could she be thoroughly cross-examined to the extent of the interview. Erica Gomez conducted the interview and through her not being available as a witness, due to her not being able to be located violated petitioner rights of confrontation Under the Sixth Amendment of the United States Constitution. Petitioner did preserve his confrontation claim in according to Tex. R. App 33.1. His counsel argued that his confrontation rights were being denied by proceeding without the presence of a witness who could not be located. There is no way of challenging the interview through someone who did not conduct it. The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that in all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him..." U.S. Const. Amend VI; Illinois v. Allen 397 U.S. 337, 338, 90 S.Ct. 1057, 25 L.Ed 2d 353 (1970). The Fourteenth Amendment makes the guarantees of this clause obligatory upon the States. Allen, 397 U.S. at 338. The right of confrontation includes the right to face to face

Conclusion

The petition for a writ of certiorari should be granted

Respectfully Submitted,
Willbur Fung

Date: April 26, 2023