

No. 22-7674

ORIGINAL

Supreme Court, U.S.
FILED

MAY 26 2023

OFFICE OF THE CLERK

In the Supreme Court of The
United States

John Paul Waldon - Petitioner

VS.

State of TEXAS - Respondent(s)

On Petition For A Writ of Certiorari
to the United States Court of
Appeals for the Fifth Circuit

Petition For Writ of Certiorari

John Paul Waldon TCWID#1602011
6535 Cagnon Rd.
San Antonio, TEXAS 78252

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Questions Presented

- ① Is Prejudice Presumed in a Fully exhausted Kimmelman Claim, when Counsel admits in Paper Hearing she believed the stop to be Faulty Re-Trial and Fails to Suppress an illegal stop, arrest, search and seizure, an unsubstantiated tip, without verifying details, in violation of 4th and 14th and 6th Amendments?
- ② Can a State Court make a Contrary Ruling, in Conflict with the Precedent, and or Federal Law?
- ③ Can a United States District Court deny a 2254 habeas corpus, with prejudice, without adjudicating the merits, and considering the Applicant's objections, after the State has filed a Summary Judgment?
- ④ Can a United States District Court dismiss a 2254 habeas Filing as being successive, deny an evidentiary hearing and ECA, without entertaining the initial writ?
- ⑤ Can a State Court reconstruct the Facts of a case on 2254 proceeding, and deprive a citizen of the right against unlawful intrusion under the 4th Amendment of the Constitution?

I - B.

- ⑥ Are the above First (5) Five Constitutional questions debatable or wrong as a matter of law?
- ⑦ Can a Federal Court of Appeals deny a Appeal or COA, when the District Court has denied a writ of habeas corpus on procedural grounds, without looking at the merits?
- ⑧ Can a Clerk in the ~~Court~~ United States Court of Appeals make a judicial ruling to not hear a Petition for re hearing in violation of the 14th Amendment, when a pro se petitioner, has dated the document and has exhausted the only means he has?

III A. List of Parties / Table of Authorities

1. WALDON V TEXAS NO. 1199792-A TEXAS
EX PARTE
COURT OF CRIMINAL APPEALS. FEBRUARY 14,
2013.

EX PARTE WALDON, 2012 TEXAS COURT OF CRIMINAL
APPEALS NO. WR. 18,308-01 OCT 31, 2012.

2. WALDON V STEPHENS, CIVIL ACTION NO H-13-3752
UNITED STATES DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF TEXAS, HOUSTON DIVISION. JUDGMENT
DECIDED JAN 26, 2015.

3. WALDON V LUMPKIN CIVIL ACTION NO.
4:22-CV-04124, UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON
DIVISION. DENIED AS MOST ANY RECD MOTION,
AND DISMISS AS SUCCESSIVE ENTERED DEC 19, 2023

WALDON V LUMPKIN NO. 23-20015 UNITED
STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
DENIED MARCH 2, 2023.

WALDON V LUMPKIN NO. 23-20015 UNITED
STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT,
ENTERED, APRIL 17, 2023.

II A.

Table of Contents

I. ^{A,B}	Questions Presented	
II. ^B	Table of Contents	
III.	Table of Authorities	
IV.	Petition For Writ of Certiorari	 1
V.	Opinions Below	 1, 2
VI.	Jurisdiction	 3
VII.	Constitutional Provisions Involved	.. 4
VIII.	Statement of Case	 5, 6
	1. Stop Based on Anonymous Tip	... 7
	without verifiable detail information.	
	2. Post Conviction 11.07 / State	... 8
	3. Post Conviction 2254 / Federal	.. 9
	4. Post Conviction 2254 Subsequent	.. 9
	5. United States Court of Appeals	.. 11
	For the Fifth Circuit	
IX.	Reasons For Granting The Writ (A-K)	16
X.	Conclusion	 17
XI.	Appendix	 18

III. B Table of Authorities

Alabama v. White	110 S.Ct. 2317	15
Ex Parte Patterson	993 SW 2d 114	8
Fallen v. United States	378 US 139	14
Florida v. J.L	120 S.Ct. 1375	15
Hohn v. United States	524 U.S. 236	12
Johnson v. Copinger	420 F.2d 399	11
Kimmelman v. Morrison	106 S.Ct. 2574	6, 9, 15
Miller - El v. Cockrell	537 U.S. 322	11
Sanders v. United States	373 U.S. 1	5, 9, 10
Strickland v. Washington	104 S.Ct. 2054	8, 15
Terry v. Ohio	88 S.Ct. 1375	15
Weeks v. United States		15

Statutes

28 USC	1254
28 USC	1254 (1) 3
18 USC	2244 5, 10
Subdivision (b)	11
2254 (d) (1)	9
2253 (c)	12, 13
2253 (c) (2)	

Constitutional Provisions

U.S. Const. Amend.	IV
U.S. Const. Amend.	VI
U.S. Const. Amend.	XIV

Petition For Writ of Certiorari

John Paul Waldon, is currently incarcerated at the Dominguez State Jail Unit in San Antonio, Texas by and through Bobby Lumpkin, For The State of Texas. Pro Se Petitioner hereby respectfully petition this Court for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit.

Opinions Below

The decision of Tex. Crim. App. was to hold in Abeyance and order evidentiary hearing July 12, 2012, and denied, December 11, 2013. Not published.

The decision of the United States District Court for the Southern District of Texas, Houston Division was to adopt the magistrate finding of fact and conclusion of law, and deny with prejudice, and deny COA, January 26, 2015. Not published.

Court of Criminal Appeals denied ADR, on June 15, 2011

Continued Opinions Below

The Decision of The United States District Court For The Southern District of Texas, Houston Division was to dismiss as successive, and deny an evidentiary hearing, and COA on December 19, 2022.

The Decision of the United States Court of Appeals was to deny COA March 2, 2023 unpublished order. (Fifth Circuit).

The Decision of the United States Court of Appeals For the Fifth Circuit was take no action on Rehearing in Banc, for no Post Mark, on March 23, 2023.

The Decision of the United States Court of Appeals For the Fifth Circuit was to deny motion for Reconsideration on April 17, 2023.

Jurisdiction

A timely petition for rehearing en banc was dismissed without action by the United States Court of Appeals for the Fifth Circuit on the date of March 23, 2023, and a copy of the action appears at Appendix J.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional And Statutory Provisions Involved

Constitution Amend IV - The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or Affirmation and particularly describing the place to be searched and the persons or things to be seized.

Constitution Amend VI In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and the cause of the accusation to be confronted with the witnesses against him to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Constitution Amend XIV Sec 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state where in they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any state deprive any persons of life, liberty, or property, without due process of law: nor deny to any person within its jurisdiction the equal protection of the laws.

(4)

Statement of Case

For over 30 years this Court has held; Restrictions on habeas review of Fourth Amendment claims held not applicable to Sixth Amendment claim that assistance of counsel was ineffective because of incompetent representation on Fourth Amendment issues.

The question is of whether I, the petitioner has met the standard in a Kimmelman claim, and did the Texas State Court unreasonably apply the Supreme Court precedent in Kimmelman, and further make a contrary ruling; and is the subsequent 2254 writ of November 25, 2022 successive. (4:22-cv-04124)

Also does the Antiterrorism and Effective Death Penalty Act, provide the jurisdiction for the United States District Court to entertain the writ, under the statute 2244 or 18 USC § 2244 and subdivision (b), Sanders v

United States 373 U.S. 1.

Furthermore is the petitioner entitled to the right to be heard, and the entitlement of COA, if the underlying Constitutional issues, has not been adjudicated on the merits in state court.

Also this case presents the question of whether the sufficiency of the evidence standard could be used, when the petitioner has clearly raised Constitutional claims under substantive Law.

It is also essential that this court iterate the right to the Appeal Process on a claim where the petitioner could be actually innocent and of a case has not been adjudicate on the merits in state court, and denied COA in United States District Court, and the United States Court of Appeal.

The Kimmelman court found the violation of prejudice, the court must consider the totality of the evidence before the Judge.

1. Stop based on Anonymous tip without specific indicia of reliability, and no verifiable detail.

On January 20, 2009, Petitioner John Paul Waldon was stopped by the Harris County Sheriff's Office, based on an Anonymous tip, where the tipster, 1. could not identify or confirm what he saw Petitioner doing. 2 The tipster could not give a description of Petitioner. 3. The tipster Failed to give a license plate number. Based on this information in the trial records, Officer Dewayne Pacifico initiated a stop of the Petitioner. Petitioner was immediately handcuffed on a Walgreens well lit parking lot. The officer then immediately asked could he search the car. The trial record testimony of Petitioner was "No"! Although the officer testifies otherwise. The officers further testified the stop was made based on the 911 Anonymous Call. Petitioner has diligently maintained his innocence and that he was stopped without probable cause.

(7) See Appendix K at 77-80-9

2. Post Conviction 11.07 State Habeas

The Case was remanded back to the trial court under Strickland and Ex Parte Patterson 993 SW2d 114, 115. An held in Abeyance For Attorney to Answer the Allegations, And For the trial court to make, further findings of fact and conclusions of law as to the reason Petitioner was stopped, and make a determination whether Counsel's deficient performance prejudiced Petitioner. See Counsel's Affidavit in the Appendix

C.

3. Post Conviction 2254 (d)(1) Federal

Petitioner Waldon renewed his Argument that Counsel was ineffective for Failure to Adjudicate Four inter lra 4th Amendment claims by Filing A motion to Suppress the tip, stop, arrest, and illegal search and seizure. The State then filed Summary Judgment, which Petitioner filed objections. At that point the Magistrate adopts the State Findings of fact and conclusions of law and the United States

District Court For the Southern District of Texas Houston Division, Judge Ewing Werten Jr. adopts the Magistrate's Finding and deny the writ, COA, and Evidentiary Hearing. Petitioner Filed an address change and objection, to maintain diligence Filed on December 18, 2014, the court concedes according to records.

4. Post Conviction 2254 subsequent writ

on November 25, 2022 after the United States District Court Failed to contact the Petitioner for 7 years the Petitioner Waldon Filed another writ under the Antiterrorism and Effective Death Penalty Act, 2254(d)(1), raising unreasonable Application of the precedent Kimmelman Failure to adjudicate the claim on the merits. In which was dismissed as a Successor writ, December 19, 2022, (Appendix F). While noting the above background to be questionable to proceed At pg 1-2 of (Appendix F). This decision violates the rules of this Court in Sanders v United States 373 U.S. 1 (1963)

The Court in Sanders said, "with reference to a successive writ Application asserting a new ground or one not previously decided on the merits the court in Sanders noted:

In either case Full consideration of the merits of the new Application can be avoided only if there has been an Abuse of the writ... And this the Government has the burden of pleading.

Sanders 18 USC § 2244, and subdivision (b) make it clear that the Court has the discretion to entertain a successive Application.

The government has the burden to plead Abuse of the writ. Sander v United States 373 US. 1, 10 (1963).

Once the government has done this the petitioner has the burden of proving that he has not Abused the writ.

If the Government chooses... to claim that the Prisoner has Abused the writ of habeas corpus, it rest with the Government to that claim with clarity and particularity in its return to the order to show Cause. (10)

The United States Supreme Court in Sanders reasoned that

Subdivision (b) is consistent with the important and well established purpose of habeas corpus. It does not eliminate a remedy to which the petitioner is rightfully entitled.

Further if petitioner is not afforded such an opportunity the requirement that he satisfy the court that he has not abused the writ is meaningless. Nor do the court think that a procedure which allows the imposition of a forfeiture for abuse of the writ, without allowing the petitioner an opportunity to be heard on the issue, comports with the minimum requirement of fairness, Johnson v Copinger 420 F.2d at 399.

5. United States Court of Appeals For the Fifth Circuit

In Miller-EI v Cockrell, 537 U.S. 322, 123 S.Ct. 1079 iterated the rules for COA.

The Certificate of Appealability (COA) determination under 28 U.S.C. § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. In the present petition the Court of Appeals for the Fifth Circuit failed to address the underlying constitutional issue on the merits.

An denied COA outside of the precedent of Hohn v United States, 524 U.S. 236, 118 S.Ct. 1969. See (Appendix H). Also see Appendix J, the denial of rehearing en banc by the United States District Clerk for the Court of Appeals Fifth Circuit.

When a habeas applicant seeks permission to initiate appeal review of the dismissal of his petition, the Court of Appeals should limit its examination to a threshold inquiry into the underlying merits of his claims consistent with prior precedent and text of the habeas corpus statute. A prisoner seeking a need only demonstrate a substantial showing of the denial of a constitutional right

28 U.S.C. § 2253 (c)(2). A Petitioner satisfies this standard by demonstrating that Jurist of Reason could disagree with the district court's resolution of his constitutional claims or that Jurist could conclude the issues presented are adequate to deserve encouragement to proceed further. See (Appendix G).

The Court's decision in *Hohn* supra held that COA determination constitutes a "case" in the Court of Appeals for purposes of this Court's jurisdiction under 28 U.S.C. § 1254, is not to the contrary. *Hohn* does not hold, nor does its logic require, that the COA determination be regarded as separate from the rest of the habeas proceeding.

In fact, *Hohn* rejected the proposition that a request to proceed before a Court of Appeals should be regarded as a threshold inquiry separate from the merits. 524 U.S. at 246.

Indeed, Hohn analogized the COA to the filing of a notice of appeal id, at 247, which in the civil context all would consider to be part of the same "proceeding") as the trial and merits appeal. The Court of Appeals has clearly erred in its legal ruling to deny COA.

Lastly the district clerk's decision to take no action on Waldon the petitioner's petition for rehearing en banc as out of time was made in error of the Supreme Court precedent of Fallen v United States, 378 U.S. 139; 84 S.Ct. 1689. The reason given

~~No~~ Post mark to confirm the date of my signature.

Stewart, J., joined by Clark, Harlan and Brennan, J., concurred in the judgment on the ground that then rule 37 (a), should be considered as complied with when a defendant incarcerated in Federal prison and acting without aid of counsel delivers his notice of appeal within period to the prison authorities for forwarding to the district court clerk. See Appendix J.

IF United States district court had entertained the writ on its merits, or the United States ~~district~~ Court of Appeals for the Fifth Circuit it would have seen the underlying constitutional issues under Kimmelman were met on 11.07, and the state court decision, was a unreasonable application of the precedence Kimmelman v Morrison 106 S.Ct. 2574.) was objectively unreasonable and wrong as a matter of Federal law, and the stop did not meet the standard under Florida v J.L 120 S.Ct. 1375. Further it lacked Probable Cause under Terry v Ohio 88 S.Ct., and had no verifiable detail information under Alabama v White 110 S.Ct. 2317, leaving the tip without any reasonable suspicion. The violation has been shown to be meritorious, and counsel failed to protect the adversarial testing under Strickland v Washington 104 S.Ct. and her failure to suppress prejudiced me. leaving the state with no evidence had she. see Weeks v United States. (15) (see Apper Forbear

Reasons For Granting the Petition

- A.) To avoid the erroneous deprivation of the right to effective assistance of counsel on a fully exhausted Kimmelman Claim.
- B.) To avoid the deprivation of due process under the 14TH Amendment.
- C.) To avoid the unlawful intrusions into the citizens of the United States person, homes, papers and effects, with out a warrant or upon the finding of Probable Cause.
- D.) To secure the supremacy clause over states who fail to abide by the constitution.
- E.) To avoid forfeiture of a right entitled under the Magna Carta, The United States Constitution, statutes, and amendments under 2254(d)(1).
- F.) To prevent abuse of discretion from jurist elected to protect the constitution.
- G.) To adjudicate the merits of a ripe Kimmelman Claim.
- H.) To ensure the right to be heard in trial, and post convictions proceedings.
- I.) To avoid erroneous abuse of discretion in the appeals process.
- J.) To uphold the United States Constitution for all citizens in the name of God.
- K.) To correct a systematical miscarriage of Justice.

(For)

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully Submitted

John Paul Walden

Date April 20, 2023