

No.

In the
Supreme Court of the United States

GARY PAUL KIRKMAN,
PETITIONER-APPELLANT,

v.

BOBBY LUMPKIN, DIRECTOR, TEXAS
DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTION DIVISION,
RESPONDENT-APPELLEE.

**On Petition for a Writ of Certiorari to the
Supreme Court for the State of Texas**

**APPLICATION FOR EXTENSION OF TIME TO
FILE PETITION FOR A WRIT OF CERTIORARI**

Robert L. Sirianni, Jr., Esquire
Counsel of Record
BROWNSTONE, P.A.
P.O. Box 2047
Winter Park, Florida 32790-2047
robertsirianni@brownstonelaw.com
(o) 407-388-1900
(f) 407-622-1511
Counsel for Petitioner-Appellant

To The Honorable Justices of the Supreme Court of the United States

Pursuant to the Rule 30.3 of this Court, Petitioner respectfully request a 45-day extension of time, to and including May 14, 2023, within which to file a Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case. Absent an extension, Petitioner's Petition would be due 90-days from the date of the Order from the United States Court of Appeals for the Fifth Circuit, dated December 30, 2022, and the subsequent posting of a Judgment, dated January 23, 2023, which is March 30, 2023.

Basis for Jurisdiction in the Supreme Court

This Court has jurisdiction to grant an application for a writ of certiorari in this case pursuant to 28 U.S.C. § 1257, as Petitioner seeks review of a judgment of the United States Court of Appeals for the Fifth Circuit.

Opinion and Order

On December 30, 2022, the United States Court of Appeals for the Fifth Circuit filed an Order memorandum decision denying Petitioner's case. See *Kirkman v. Lumpkin*, Case Nos. 22-20415 (United States Court of Appeals for the Fifth Circuit), 4:31-CV-00903 (United States District Court of Houston County).

Judgment Sought to be Reviewed

The United States Court of Appeals for the Fifth Circuit affirmed the United States District Court for the Southern District of Texas, Houston Division, on December 30, 2022. Both courts held in denying Petitioner Habeas Corpus relief and a subsequent Certificate of Appealability.

Petitioner claims that these findings are without merit and contrary to the law of this Court.

Reasons for Extension of Time

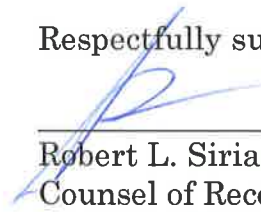
The additional time is warranted due to significant professional obligations in pending appellate matters and the need to consult and obtain documentary evidence. The legal issues in the case require coordination between counsel and Petitioner. This process is lengthened by the status of Petitioner who is incarcerated.

Petitioner believes an extension will result in no prejudice to Respondent.

CONCLUSION

Petitioner's request is intended to ensure that Petitioner and counsel have adequate opportunity to discuss the merits of their claim, retrieve and review all appellate documents, and provide complete and effective assistance of counsel.

Respectfully submitted,



Robert L. Sirianni, Jr., Esquire
Counsel of Record
BROWNSTONE, P.A.
P.O. Box 2047
Winter Park, Florida 32790-2047
(o) 407-388-1900
robertsirianni@brownstonelaw.com
Counsel for Petitioner-Appellant

Dated: March 9, 2023.

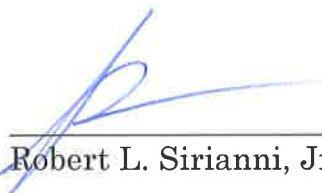
CERTIFICATE OF CONSULTATION

I HEREBY CERTIFY that counsel for Respondent was contacted via e-mail for Respondent's position regarding this extension and no response was received as to an objection.

CERTIFICATE OF SERVICE

I, Robert L. Sirianni, Jr., hereby certify that an original and 2 copies of the foregoing Application for Extension of Time for the matter of *Gary Paul Kirkman v. Bobby Lumpkin, Director, Texas Department of Criminal Justice, Correctional Institution Division*, were sent via Next Day Service to the U.S. Supreme Court, and 1 copy was sent Next Day Service and email to the following parties listed below, this 9th day March 2023.

Andrew Anderson, Assistant Attorney General
Rhett Bartlett, Assistant Attorney General
Office of the Texas Attorney General
P.O. Box 12548
Austin, TX 78711
Tel: (512) 936-1400
Emails: Andrew.Anderson@oag.texas.gov



Robert L. Sirianni, Jr., Esquire

United States Court of Appeals
for the Fifth Circuit

United States Courts
Southern District of Texas
FILED

December 30, 2022

Nathan Ochsner, Clerk of Court

No. 22-20415

United States Court of Appeals
Fifth Circuit

FILED

December 30, 2022

Lyle W. Cayce
Clerk

GARY PAUL KIRKMAN,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice,
Correctional Institutions Division,*

Respondent—Appellee.

Application for Certificate of Appealability from the
United States District Court for the Southern District of Texas
USDC No. 4:21-CV-903

ORDER:

Gary Paul Kirkman, Texas prisoner # 02229816, was convicted of continuous sexual abuse of a child, and he received a sentence of 60 years in prison. He now seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 application challenging this conviction. In his sole argument, he asserts that the introduction of sexual assault nurse examiner (SANE) records at his trial violated the Confrontation Clause because evidence that the SANE amended her records following a review by a doctor was testimonial in nature. Kirkman does not brief his argument raised in the district court that the storage of SANE records apart

No. 22-20415

from the patient's regular medical records establishes that such records were not made for the purpose of medical diagnosis, and such a contention is deemed abandoned. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999).

A COA may issue if a prisoner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Slack v. McDaniel*, 529 U.S. 473, 484 (2000). To obtain a COA, Kirkman must establish that reasonable jurists would find the decision to deny relief debatable. *See Slack*, 529 U.S. at 483-84. He has not made the required showing. Accordingly, his motion for a COA is DENIED.

/s/ James L. Dennis
JAMES L. DENNIS
United States Circuit Judge

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

December 30, 2022

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 22-20415 Kirkman v. Lumpkin
USDC No. 4:21-CV-903

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

Christina Rachal

By: _____
Christina C. Rachal, Deputy Clerk
504-310-7651

Mr. Rhett Wayne Bartlett
Mr. Edward Larry Marshall
Mr. Nathan Ochsner
Mr. Robert L Sirianni Jr.
Ms. Jennifer Wissinger

United States Court of Appeals
for the Fifth Circuit

United States Courts
Southern District of Texas
FILED

January 23, 2023

Nathan Ochsner, Clerk of Court

No. 22-20415

United States Court of Appeals
Fifth Circuit

FILED

December 30, 2022

Lyle W. Cayce
Clerk

GARY PAUL KIRKMAN,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice,*
Correctional Institutions Division,

Respondent—Appellee.

Application for Certificate of Appealability from the
United States District Court for the Southern District of Texas
USDC No. 4:21-CV-903

ORDER:

Gary Paul Kirkman, Texas prisoner # 02229816, was convicted of continuous sexual abuse of a child, and he received a sentence of 60 years in prison. He now seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 application challenging this conviction. In his sole argument, he asserts that the introduction of sexual assault nurse examiner (SANE) records at his trial violated the Confrontation Clause because evidence that the SANE amended her records following a review by a doctor was testimonial in nature. Kirkman does not brief his argument raised in the district court that the storage of SANE records apart



Certified as a true copy and issued
as the mandate on Jan 23, 2023

Attest: *Lyle W. Cayce*
Clerk, U.S. Court of Appeals, Fifth Circuit

No. 22-20415

from the patient's regular medical records establishes that such records were not made for the purpose of medical diagnosis, and such a contention is deemed abandoned. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999).

A COA may issue if a prisoner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Slack v. McDaniel*, 529 U.S. 473, 484 (2000). To obtain a COA, Kirkman must establish that reasonable jurists would find the decision to deny relief debatable. *See Slack*, 529 U.S. at 483-84. He has not made the required showing. Accordingly, his motion for a COA is DENIED.

/s/ James L. Dennis
JAMES L. DENNIS
United States Circuit Judge

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

January 23, 2023

Mr. Nathan Ochsner
Southern District of Texas, Houston
United States District Court
515 Rusk Street
Room 5300
Houston, TX 77002

No. 22-20415 Kirkman v. Lumpkin
USDC No. 4:21-CV-903

Dear Mr. Ochsner,

Enclosed is a copy of the judgment issued as the mandate.

Sincerely,

LYLE W. CAYCE, Clerk



By: Rebecca L. Leto, Deputy Clerk
504-310-7703

cc: Mr. Rhett Wayne Bartlett
Mr. Edward Larry Marshall
Mr. Robert L Sirianni Jr.
Ms. Jennifer Wissinger