

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID McWHITER — PETITIONER
(Your Name)

VS.

LORI E. DAVIS, DIRECTOR, TDCJ RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

Please check the appropriate boxes:

Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding, and:

The appointment was made under the following provision of law: _____, or _____

a copy of the order of appointment is appended.

David McWhiter
(Signature)

**AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS***

I, DAVID McWHERTER, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	\$ <u>0</u>	\$ _____	\$ _____	\$ _____
Self-employment	\$ <u>0</u>	\$ _____	\$ _____	\$ _____
Income from real property (such as rental income)	\$ <u>0</u>	\$ _____	\$ _____	\$ _____
Interest and dividends	\$ <u>0</u>	\$ _____	\$ _____	\$ _____
Gifts	\$ <u>0</u>	\$ _____	\$ _____	\$ _____
Alimony	\$ <u>0</u>	\$ _____	\$ _____	\$ _____
Child Support	\$ <u>0</u>	\$ _____	\$ _____	\$ _____
Retirement (such as social security, pensions, annuities, insurance)	\$ <u>0</u>	\$ _____	\$ _____	\$ _____
Disability (such as social security, insurance payments)	\$ <u>914.00</u>	\$ _____	\$ _____	\$ _____
Unemployment payments	\$ <u>0</u>	\$ _____	\$ _____	\$ _____
Public-assistance (such as welfare)	\$ <u>0</u>	\$ _____	\$ _____	\$ _____
Other (specify): <u>Food Stamp</u>	\$ <u>280.00</u>	\$ _____	\$ _____	\$ _____
Total monthly income:	\$ <u>914.00</u>	\$ _____	\$ _____	\$ _____

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A			\$
			\$
			\$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A			\$
			\$
			\$

4. How much cash do you and your spouse have? \$

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Type of account (e.g., checking or savings)	Amount you have	Amount your spouse has
CHECKING AT THIS TIME	\$ 680.00	\$
	\$	\$
	\$	\$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

Home
Value _____ N/A

Other real estate
Value _____ N/A

Motor Vehicle #1
Year, make & model 2013 NISSAN ROADE
Value \$15,000.00 (GIFT)

Motor Vehicle #2
Year, make & model N/A
Value _____

Other assets
Description _____ N/A
Value _____

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
<u>WPA</u>	\$ _____	\$ _____
_____	\$ _____	\$ _____
_____	\$ _____	\$ _____

7. State the persons who rely on you or your spouse for support. For minor children, list initials instead of names (e.g. "J.S." instead of "John Smith").

Name	Relationship	Age
<u>WPA</u>	_____	_____
_____	_____	_____
_____	_____	_____

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home)	\$ <u>450.00</u>	\$ _____
Are real estate taxes included? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		
Is property insurance included? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	\$ <u>N/A</u>	\$ _____
Home maintenance (repairs and upkeep)	\$ <u>245.00</u>	\$ _____
Food	\$ <u>0.</u>	\$ _____
Clothing	\$ <u>20.00</u>	\$ _____
Laundry and dry-cleaning	\$ <u>20.00</u>	\$ _____
Medical and dental expenses	\$ <u>0</u>	\$ _____

	You	Your spouse
Transportation (not including motor vehicle payments)	\$ <u>25.00</u>	\$ _____
Recreation, entertainment, newspapers, magazines, etc.	\$ <u>0</u>	\$ _____
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	\$ <u>0</u>	\$ _____
Life	\$ <u>0</u>	\$ _____
Health	\$ <u>0</u>	\$ _____
Motor Vehicle	\$ <u>132.00</u>	\$ _____
Other: <u>Medicare/Medicaid</u>	\$ <u>0</u>	\$ _____
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	\$ <u>0</u>	\$ _____
Installment payments		
Motor Vehicle	\$ <u>0</u>	\$ _____
Credit card(s)	\$ <u>0</u>	\$ _____
Department store(s)	\$ <u>0</u>	\$ _____
Other: _____	\$ <u>0</u>	\$ _____
Alimony, maintenance, and support paid to others	\$ <u>0</u>	\$ _____
Regular expenses for operation of business, profession, or farm (attach detailed statement)	\$ <u>0</u>	\$ _____
Other (specify): _____	\$ <u>0</u>	\$ _____
Total monthly expenses:	\$ <u>892.00</u>	\$ _____

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

Yes

No

If yes, describe on an attached sheet.

10. Have you paid - or will you be paying - an attorney any money for services in connection with this case, including the completion of this form? Yes No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

Yes

No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

ON DISABILITY ALL POSSESSIONS GIFTED

I WAS GIVEN VEHICLE IN MY NAME TO PAY FOR INSURANCE

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: JANUARY 17, 2023

Donald McWherter
(Signature)

No. _____

In the

Supreme Court of the United States

David McWherter -- Petitioner

vs.

Lorie Davis, Director -- Respondent

of TX Dept. of Criminal Justice,

Institutional Division

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

David McWherter

2929 Stevens Dr. #46

Bryan, TX 77803

979-204-5536

QUESTION PRESENTED

Does the Anti-Terrorist and Effective Death Penalty Act (A.E.D.P.A.) preempt the constitution by eliminating the Habeas Writ as a challenge to excessive confinement or illegal incarceration?

If 28 U.S.C. § 2244 (d)(1) applies "across the board to petitions attacking the prisoner's conviction as well as the calculation of time served." *Kimbrell v. Cockrell*, 311 F.3d 361,363 (5th Cir. 2002).

Then this one act of Congress authorizes all possible violations of the constitution resulting in prison officials sentencing and resentencing prisoners for the same offense.

However, "No act of Congress can authorize a violation of the Constitution." See *United States v. Brigoni-Ponce*, 95 S.Ct. 2574, 2578 (1975).

Therefore the precedent opinion *Wilkinson v. Dotson* must prevail in that any writ filed that pertains to a prisoner's release or future release must be a writ of Habeas Corpus 22.54. See *Wilkinson v. Dotson*, 544 U.S. 74 (2005).

LIST OF PARTIES

All Parties appear on the caption of the case on the cover page.

RELATED CASES

None

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STATUTES AND RULES

9. Texas Code of Criminal Procedure Art. 42.12 Sec. A of the 60 th Legislature, Date Range 9-1-67 to 8-31-77
10. Texas Code of Criminal Procedure Art. 42.12 Sec. C of the 65 th Legislature, Date Range 9-1-77 to 8-31-83

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is unpublished.

Appendix A – No. 15-41281 David McWherter v. Lorie Davis, Director of Texas Dept. of Criminal Justice.

APPENDIX B - 208TH DISTRICT COURT'S DECISION TO HOLD PETITIONER
TO 65TH LEGISLATURE.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT



No. 15-41281
USDC No. 6:13-CV-591

A True Copy
Certified order issued May 18, 2016

DAVID WAYNE MCWHERTER,

Judy W. Cayer
Clerk, U.S. Court of Appeals, Fifth Circuit

Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court for the
Eastern District of Texas, Tyler

ORDER:

David Wayne McWherter, Texas prisoner # 267382, was convicted of aggravated robbery and sentenced to life imprisonment in 1977. He seeks a certificate of appealability (COA) to appeal the dismissal of his 28 U.S.C. § 2254 application as time barred.

In order to obtain a COA, McWherter must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When the district court denies federal habeas relief on procedural grounds, the applicant must demonstrate that reasonable jurists would find it debatable whether the 28 U.S.C. § 2254 application states a valid claim of the denial of a constitutional right and

APPENDIX A

whether the district court was correct in its procedural ruling. *Slack*, 529 U.S. at 484.

In his COA motion and brief, McWherter does not challenge the district court's determination that his application was untimely under 28 U.S.C. § 2244(d)(1). Although pro se briefs are liberally construed, even pro se litigants must brief arguments in order to preserve them. *Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993). Issues not briefed in a request for a COA are considered abandoned. *Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999). Therefore, McWherter has abandoned the issue whether his 28 U.S.C. § 2254 application was timely filed.

Instead, he argues that the district court could not dismiss his 28 U.S.C. § 2254 application without reviewing the merits of his claims because a claim of excessive confinement cannot be denied or dismissed as time barred. (He also reasserts the substance of the claims raised in the district court: that he has been held past his discharge date based on the application of Texas laws that violate the Ex Post Facto Clause, and that he is being held in violation of his due process rights.) Contrary to McWherter's contention, the one-year limitations period of 28 U.S.C. § 2244(d)(1) applies "across-the-board to petitions attacking the prisoner's conviction as well as the calculation of time served." *Kimbrell v. Cockrell*, 311 F.3d 361, 363 (5th Cir. 2002). Thus, he has not shown that reasonable jurists would find debatable the district court's procedural ruling dismissing the 28 U.S.C. § 2254 application as time barred. See *Slack*, 529 U.S. at 484. McWherter's COA motion and his motion for leave to proceed in forma pauperis are DENIED.


STEPHEN A. HIGGINSON
UNITED STATES CIRCUIT JUDGE

Offenses	County	Cause Number	Sentence	Offense Date	Sentence Date	Sentence Begin Date	Maximum Expiration Date
Aggravated Robbery	Harris	244438	Life	1-30-1976	1-6-1977	Cumulative Begin date 10-19-1973	LIFE
Aggravated Robbery	Harris	254506 cumulative to Cause#244438	99-years	11-2-1976	Re-sentenced 4-11-1979	890-Days pre-sentence jail credit	

Offender McWherter was received into TDCJ custody on 4-12-1977 from Harris County on a Life and 50-year sentence. Offender McWherter was convicted by the 208th District Court for the following:

- Aggravated Robbery, under cause number 244438. Offender McWherter was convicted for an offense occurring on 1-30-1976, with sentencing on 1-6-1977, and sentence to begin on 3-27-1976.
- Aggravated Robbery, under cause number 254506. Offender McWherter was convicted for an offense occurring on 11-2-1976, with sentencing on 4-11-1979, with sentence cumulative to cause number 244438.

Before September 1, 1987, consecutive sentences were added together and treated as one sentence for the purpose of determining eligibility for release on parole and mandatory supervision and for the purpose of determining an offender's final discharge date. Credit for all time in jail prior to sentence in each cause was also cumulated. *Ex parte Bynum*, 772 S.W.2d 113 (Tex. Crim. App. 1989).

Offender McWherter was allowed 285-days of pre-sentence jail credit on cause number 244438 (sentence to begin on 3-27-1976) and 890-days of pre-sentence jail credits on cause number 254506. This changed the cumulative sentence begin date from 3-27-1976 to 10-19-1973. *Ex parte Bynum* 772 S.W.2d 113 (Tex. Crim. App. 1989).

On 10-20-1978 the Court of Criminal Appeals issued Mandate No. 58,769, reversing and remanding cause number 254506.

Offender McWherter was returned to Harris County custody by bench warrant on 10-24-1978, and was re-sentenced by the 208th District Court, under cause number 254506. Offender McWherter was sentenced to 99-years, with sentencing on 4-11-1979, and sentence cumulative to cause number 244438.

Offender McWherter's cumulative life sentence makes him ineligible for release onto mandatory supervision. See *Ex parte Franks*, 71 S.W.3d 327 (Tex. Crim. App. 2001) ("mathematically impossible to determine a mandatory supervision release date on a life sentence because the calendar time served plus any accrued good conduct time will never add up to life.").

Offender McWherter does not have a liberty interest in being released to parole that is protected by the Due Process Clause. *Johnson v. Rodriguez*, 110 F.3d 299, 305 (5th Cir. 1997). Parole is a privilege, not an offender right, and the Board of Pardons and Paroles is vested with complete discretion to grant, or to deny parole release as defined by statutory law.

This office has not received any Time Dispute Resolution Forms from Offender McWherter.

STATE COURT'S DECISION BASED ON
EX PARTE FRANKS, 71 S.W.3d 327

APPENDIX B

JURISDICTION

The date on which the United States Court of Appeals decided my case was May 18, 2016. No Petition for Rehearing was timely filed in my case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- 1. Anti-Terrorist and Effective Death Penalty Act (A.E.D.P.A.)**
- 2. United States Constitution Art. 1 Section 9 Clause 3, Bills of Attainder and
Ex Post Facto. U.S.C.Article 1 § 9 CL. 3**
- 3. Due Process Clause of Fifth and Fourteenth Amendments**

STATEMENT OF THE CASE

Petitioner is challenging the Fifth Circuit decision that a Writ of Habeas Corpus 22.54 filed for excessive confinement can be time barred by the A.E.D.P.A. The 1-year statute of limitations does not bar a challenge of excessive confinement, but rather the appeal of a conviction one year after the final conviction of that sentence.

Petitioner did not challenge the calculation of sentence but instead the State Court's decision to rule that petitioner fell under the 65th legislature based on sentence rather than the 60th legislature in effect at the time of the offense. This ex post facto application of 65th legislative law on an aggravated robbery committed under 60th legislative law deprived petitioner of a short way discharge for a robbery committed under the 60th legislative law.

Petitioner discharged life sentence on or about November 15, 1994, and then discharged that same sentence again on or about December 11, 2015, and then began serving that same sentence a third time before finally being paroled May 29, 2022.

This Writ was timely filed in August of 2016 while in prison, but this Writ and a supplemental brief were stolen from the unit mailroom by state officials.

REASON FOR GRANTING PETITION

Under Wilkinson v. Dotson any Writ that pertains to the immediate or future release of an inmate must be a Writ of Habeas Corpus 22.54 rather than a 1983 Civil Rights Lawsuit. The A.E.D.P.A. Rule 22.44 (d) (1) time barring the Habeas Writ prohibits any state prison inmate from filing a Writ of Habeas Corpus 22.54 for his release even after discharging his sentence by legislative law several times. This inmate can only be released at the discretion of prison officials. This Fifth Circuit decision surgically bars the judicial branch from supporting the Constitution against violations by State Prison and other Government officials.

This Writ was timely filed before Aug. 16, 2016, but mysteriously disappeared from the unit mailroom.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

David McWherter

David McWherter

Date: JANUARY 17, 2023

No. _____

In the

Supreme Court of the United States

David McWherter -- Petitioner

vs.

Lorie Davis, Director -- Respondent
of TX Dept. of Criminal Justice

PROOF OF SERVICE

I, David McWherter, do swear or declare on this date, January 6, 2023, as required by Supreme Court Rule 29, I have enclosed a petition for a Writ of Certiorari to each party to the above proceeding or that parties' counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail, properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within three calendar days.

The names and addresses of those served are as follows:

Office of the Attorney General

P.O. Box 12548

Austin, TX 78711-2548

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 17, 2023.

David McWherter
Signature