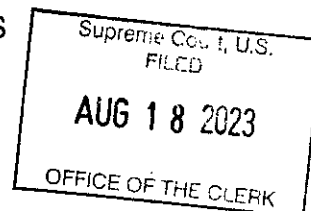


No. 23-5500

IN THE

SUPREME COURT OF THE UNITED STATES

Office of the Clerk



LeTroy D. Merritt — PETITIONER
(Your Name)

vs.

Lumphin, Div., TX DCJ — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The Twelfth Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

LeTroy D. Merritt
(Your Name)

Clemens Unit 11034 Hwy 36
(Address)

Brazoria, Tx 77422
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

- A). Can an state evidentiary rulings violate the Constitution mount to depriving the petitioner of a fundamental fair trial? (inadmissible text messages).
- B). Are state evidentiary rulings that deprives the petitioner of fundamental fairness cognizable on habeas corpus?
- C). Does re-litigation of a claim that previously was raised and rejected on direct appeal constitute a ~~prod~~procedural bar to Federal review of the claim?
- D). After an direct appeal does an petitioner have to seek an Petition for discretionary review [and] a state writ of habeas corpus (post-conviction collateral procedures); in order to avoid the state procedural default?

The 9th Circuit stated, "The Supreme Court has made "very few rulings regarding the admission of evidence as a violation of due Process"; specifically, it has never "made a clear ruling that admission of overtly prejudicial evidence constitutes a due process violation sufficient to warrant the issuance of the writ." *Holley v. Yarbrough*, 568 F.3d. 1091, 1101 (9th Cir. 2009).

The Fifth Circuit continues to inject merits-based analysis into threshold procedural questions, in violation of litigants' due process rights.

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

~~Brooks v. State, 132 S.W. 3d 702 (2009)~~
~~McCarthy v. State, 65 S.W. 3d 47 (2001)~~
~~Scott v. State, 165 S.W. 3d 60~~
~~Scott v. State, 227 S.W. 3d (2005)~~
Merritt v. State, 2018 Tex. App. LEXIS 8469, 2018 WL 5023590 (Tex. App. Tyler, Oct. 17, 2018)
Merritt's state habeas corpus petition June 24, 2019,
Denied w/o written order Oct. 2, 2019
Merritt v. Dir., TDCJ-LID, 2022 U.S. DIST LEXIS 106170
(E.D. Tex. April 20, 2022)
MERRITT v. Lumpkin, 2023 U.S. App. LEXIS 13897
(5th Cir. Tex. June 1, 2023)

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Dorley v. Mayo, 351 U.S. 277 (1956)
Escobedo v. Estelle, 650 F.2d 70 (5th Cir. 1981)
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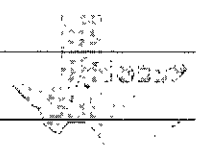
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Wainwright v. Sykes, 433 U.S. 72, 87, 53 L.ed. 2d. 594, 97 S.Ct. 2497 (1977)

Wright v. Rivard, 856 Fed. Appx. 16 (6th Cir. 2021)



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 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 United States district court 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.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits 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 _____ 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.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was June 01, 2023.

☐ 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: June 21, 2023, and a copy of the order denying rehearing appears at Appendix 6.

☐ 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 _____.
A copy of that decision appears at Appendix _____.

☐ 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

The due process inquiry in federal habeas review is whether the admission of evidence was arbitrary or so prejudicial that it rendered the trial fundamentally unfair. The issue when ruling upon a federal habeas corpus petition is not whether introduction of evidence violated state law evidentiary principles, but whether the trial court committed an error which rendered the trial fundamentally unfair that it violated federal due process. A petitioner is entitled to habeas relief if unconstitutional trial error is found to have had substantial and injurious effect or influence in determining the jury's verdict and resulted in actual prejudice. The due process clause of the Fourteenth Amendment is exactly like a similar provision in the Fifth Amendment it states that no person shall be "deprived of life, liberty, or property without due process of law." Usually, "due process" refers to fair procedures.

AEDPA of 1996 28 U.S.C.S. § 2254 (d)(1),(2)
28 U.S.C.S § 2254 (c)
Fed. R. Crim. P. 52(b)
Vernon's Ann. Texas C.L.P Arts 11.07, 38.071, 2

STATEMENT OF THE CASE

On February 05, 2017, four individuals participated in an armed robbery (unloaded BB gun) of a Walmart store located at 6801 South Broadway in Tyler, Texas; where petitioner, was the overnight assistant manager. One of the participating individual was the live-in girlfriend of the petitioner. She (Ms. Breonna Poole) had some questionable text messages in her phone. Those text messages were used at trial without being properly authenticated nor foundation laid before being admitted into evidence, which in fact violated Mr. Merritt's due process and the error had a substantial or injurious effect or influence on the jury's verdict.

U.S. v. Benitez, 542 U.S. 74, 159 L.Ed. 2d 157, 124 S.Ct. 2333 (2004), states to affect "Substantial rights" See 28 USC § 2111, an error must have "substantial and injurious effect [or] influence in determining the verdict. Id. at 81.

Calderon v. Coleman, 525 U.S. 141-145, 119 S.Ct. 500, 142 L.Ed. 2d. 521 (1998), states habeas corpus 481 - federal court may grant habeas relief based on trial error only when that error had substantial and injurious effect or influence in determining the jury's verdict.

Escobedo v. Estelle, 650 F.2d 70 (5th Cir. 1981), states the exhaustion doctrine requires only that the federal claim have been fairly presented to the highest court of the state, either on direct review of the conviction or in a post-conviction state writ 11.07 attack. Dismissal by Texas Court of Criminal Appeals without opinion satisfied the exhaustion requirement (Carr v. Alabama, 586 F.2d 462 (5th Cir. 1978)).

Kelly v. California, 555 U.S. 1020 (2008), states in the event that evidence is introduced the Due Process clause of the Fourteenth Amendment provides a mechanism that is so unduly prejudicial that it renders the trial fundamentally unfair.

United States v. Miller, 688 F.3d 322 (7th Cir. 2012), states "Evidence is unduly prejudicial if it creates a genuine risk that the emotions of the jury will be excited to irrational behavior, and the risk is disproportionate to the probative value of the offered evidence".

United States v. Dominguez Benitez, 542 U.S. 74, 81 124 S.Ct. 2333, 159 L.Ed. 2d. 157 (2004), states relief for a trial error is dependent or "tied in some way" to its "prejudicial effect".

Lisamba v. California, 314 U.S. 219 (1941), states unfairness exists when inadmissible evidence is used as a mean of obtaining a verdict of guilt.

Panzavacchia v. Wainwright, 658 F.2d 337 (5th Cir. 1981), states cognizable issues, evidentiary rulings, 28 U.S.C.S 2254 is the proper vehicle for habeas corpus relief if the petitioner can show that he is in custody in violation of the Constitution, laws or treaties of the United States — an error in a state trial does not justify habeas corpus relief unless it is of such a magnitude as to render the trial fundamental unfair, and, to the end, violative of due process. Although the determination of fundamental fairness is necessarily imprecise, erroneous admission of prejudicial evidence can lead to federal habeas corpus relief it is material in the sense of a crucial, critical, highly significant factor.

Wright v. Rivard, 856 Fed. Appx. 16 (6th Cir. 2021), states due to its unreliability, the improper admission of hearsay evidence can violate constitutional due process protections regardless of whether it would independently violate the confrontation clause.

United States v. Shoupe, 548 F.2d. 636, 643-644 (CA6, 1977), states admission of unreliable hearsay required reversal under due process clause because it extended beyond "permissible limits of fairness".

Colo v. Connelly, 479 U.S. 157 (1986), states the aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfair in the use of evidence, whether true or false.

Pulley v. Harris, 465 U.S. 37, 41, 104 S.Ct. 871, 79 L.Ed 2d 29 (1984), states an error of state law may be "sufficiently egregious to amount to a denial of equal protection or of due process of law guaranteed by the Fourteenth Amendment."

Payne v. Tennessee, 501 U.S. 808 (1991), states in the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.

Thomas v. State, 723 S.W. 2d. 696 (Tex. Cr. App. 1986), states the harmful effect of improperly admitted evidence is not cured by the fact that the defendant sought to meet, destroy, or explain it by the introduction of rebutting evidence.

~~United States~~ *Calderon v. United States District Court*, 96 F.3d 1126, 1131 (9th Cir. 1996), states the bar merely to relitigation of the actually adjudicated claim does not constitute a procedural bar to federal review of the claim. Only if a petitioner asserts that admission of evidence by the state court violated his due process rights is the claim cognizable on federal habeas review, and then only if the evidence rendered the trial "fundamentally unfair." See, e.g., *Lowe v. Schomig*, 2007 U.S. Dist. LEXIS 17289 (2007).

I. The Fifth Circuit's practice of conflating merits-based analyses with respect to Certificates of Appealability, this Court already has, on multiple occasions, struck down the Fifth Circuit for adjudicating the merits of a claim prematurely. See *Buck v. Davis*, 137 S.Ct. 759 (2017); *Miller-El v. Cockrell*, 537 U.S. 322 (2003). Much like the determination of whether a litigant has "alleged" or "asserted" a proper claim for relief, the COA stage demands only a "threshold inquiry" that does not require full consideration of the factual or legal bases adduced in support of the claims. *Miller-El*, 537 U.S. at 336. With respect to habeas petitions, the Fifth Circuit has engaged in a practice of dismissing habeas petitions as procedurally barred.

Wainwright v. Sykes, 433 U.S. 72, 87, 53 L.Ed. 2d 594, 97 S.Ct. 2497 (1977), states the entire point of a habeas petition that challenges a state conviction is to relitigate issues that were raised in the state case and resolved against the petitioner.

Jones v. Cain, 600 F.3d 527 (5th Cir. 2010), states regardless of how a state court applies state evidentiary rules, a federal habeas court has an independent duty to determine whether that application violates the Constitution.

Scott v. Shinn, 2021 U.S. DIST. LEXIS 236444, states a document filed pro se is to be liberally construed, and, a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleading drafted by lawyers. (*Erickson v. Pardus*, 551 U.S. 89, 94, 127 S.Ct. 2197, 1167 L.Ed. 2d 1081 (2007)).

REASONS FOR GRANTING THE PETITION

The Twelfth District Court of Appeals of Texas, although they concluded that the trial court abused its discretion, which it should have concluded. Afterward, it failed to conduct a fair and meaningful harm analysis because it analyzed caselaws that were differential from Mr. Merritt's case facts. The Justices of said court did not review/compare/analyze any caselaws where the state continued to rely on inadmissible hearsay evidence or made multiple references to inadmissible evidence. Instead the Justices analyzed caselaws where the inadmissible evidence were barely mentioned or were only mentioned at the time of its introduction. See what the Justices stated, "Nonetheless, despite its direct evidence linking appellant to the crime, the state continued to rely on the text messages to a degree, and made multiple references to them during its closing arguments to the jury." The same text messages that the Justices stated, "Undoubtedly tended to connect appellant to the crime. How did the jury analyze those text messages? Had the text messages not been allowed then the outcome of the trial would have been different because the two individuals that went inside the cash office behind Ms. Williams; closed the door leaving the money (that they were robbing) outside the closed door in the money cart. Neither one of said individuals knew of the quickest, safer exit door next to the cash office. Foremore, neither one of them had name tags or vests (in order to look like a Walmart worker). There was no evidence that Mr. Merritt communicated with any of said individuals (other than Ms. Breonna Poole) in order to plan/mastermind said crime. Further, appellant never touched the unloaded BB gun (that was used and dropped) although Mr. Merritt was the first manager to the location where it was dropped. The text messages had a substantial and injurious effect or influence in determining the jury's verdict, which in fact affected Mr. Merritt's substantial rights and due process to a fair trial. The 28 U.S.C.S. § 2254 (c) requires only that state prisoners give state courts a fair opportunity to act on their claims. In *Laynachan v. Davis*, 766 Fed. Appx. 156, 2019 U.S. App. LEXIS 10086 (5th Cir. 2019) the Fifth Circuit stated that a petitioner has two options for review in the state highest court which in Texas is the TCCA. One option is to file a petition for discretionary review (PDR) following a direct appeal [OR] an application for a post-conviction writ of habeas corpus. Tex. R. App. Proc. 68.1; Tex. Code of Crim. Proc. Art. 11.07. Here, Mr. Merritt did file an application for a post-conviction writ of habeas corpus (which gave the TCCA an opportunity.

on said claims) was denied and deemed as procedural default because Mr. Merritt did not file an petition for discretionary review.

The national importance of having the Supreme Court decide the questions!

"The Supreme Court has made 'very few rulings regarding the admission of evidence as a violation of due process.'; specifically, it has never 'made a clear ruling that admission of overtly prejudicial evidences constitutes a due process violation sufficient to warrant the issuance of the writ.'" *Holley v. Harboraugh*, 568 F.3d. 1091, 1101 (9th Cir. 2009).

During its closing arguments to the jury the State stated, "The text messages is probably the most conclusive evidence" of Mr. Merritt's guilt, they are probative of Mr. Merritt's guilt. "When he sent this text message [about using a gun], he was telling her, tell him to point that real gun at my employee, the person I'm supposed to protect." "He said point a real gun at my employee and tell her, if she says a word, she's going to die."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Mr. Troy D. MERRITT
L. A. H.

Date: Aug. 18, 2023 (18)

CONCLUSION

For the foregoing reasons, this Court should grant a writ of Certiorari.

Respectfully submitted on this 18th day
of August, 2023.

La'Troy D. Merritt
L. D. Merritt

