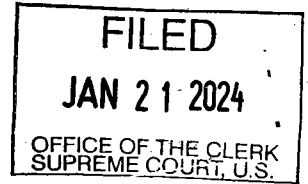


23 - 6956

No. _____



IN THE

SUPREME COURT OF THE UNITED STATES

David Wilbanks — PETITIONER
(Your Name)

vs.

Bobby Lumpkin TDCJ CID — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S.D.C. Eastern District of Texas Sherman Div.
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

David Wilbanks TDCJ # 2086969
(Your Name)

9601 SPUR 591
(Address)

Amarillo, Tx. 79107
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Did the Fifth Cir. Court of Appeals have jurisdiction over the COA (certificate of appealability) when District Judge lacked to issue or deny a COA in the Final Judgment under Fed. R. 11(a) that govern 2254?
2. Did the Trial Court by limiting the cross-examination from defense to accuser, violated the Confrontation Clause warranted by the six Amendment of the United States Constitution and the ~~fourteenth~~ Amendment?

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:

N/A

RELATED CASES

N/A

TABLE OF AUTHORITIES CITED

CASES

PAGE NUMBER

1. Black V. Davis 902 F.3d 541, 544 (5 th Cir 2018)	5
2. Chretien V. N.H. State Prison 2008 DNH 84 2008 U.S. Dist. Lexis 533217	5
3. Del. V. Van Aersdall 475 US 673	5
4. Lowery V. Collins 988 F.2d 1364, 1367 (5 th Cir 1993)	5
5. Malchi V. Thaler 211 F.3d 953, 957 (5 th Cir. 2000)	5
6. Moore V. Cockrell 313 F.3d 880, 881 (5 th Cir 2002)	5
7. Ramirez Cardenas V. Thaler 404 ⁶⁵¹ F.3d 442 (Aug. 22, 2011)	5
8. Renico V. Lett 559 U.S. 766, 773 (2010)	5
9. Tanner V. Harris ^{Yukins} 776 F.3d 434, 436, 443, 444 (6 th Cir 2015)	5
10. White V. Complan 399 F.3d 18 (1 st Cir 2005)	5
11. Wilbanks V. Dir. Tex. Dept. of Crim. Just. Inst. Div. 2023 Dist. Lexis 36901	5
10. Wallace V. Mississippi, 43 F.4th 482 (2022)	5

STATUTES AND RULES

Fed R. Evidence 608	5
Fed R. 11(a) governing ³ 2254 Cases	5
Fed R. 4/2	5

OTHER

N/A

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	5
CONCLUSION.....	6

INDEX TO APPENDICES

APPENDIX A-	Order of U.S. Court of Appeal (5 th Cir.)
APPENDIX B-	U.S. Magistrate Report U.S. Eastern District Judge Adopted Final Judgment
APPENDIX C-	Court of Criminal Appeals
APPENDIX D-	Court of Appeal (2 nd Dist.) Memorandum Opinion Court of Appeal (2 nd Dist.) Judgment
APPENDIX E-	Exhibit A - Letter from Mac 5 of 5 Exhibit B - Trial Court Transcripts Exhibit C - U.S. Eastern District Court Post Judgment Dismissing "COA"
APPENDIX F-	Exhibit D - U.S. 5 th Cir. Clerk letter "no action taken" (ON REhearing)

Admitted in to
Evidence AT Trial.

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 A 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 B to the petition and is 2022 U.S. Dist. Lexis 239525

☒ reported at 2023 U.S. Dist. Lexis 36981; 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 C to the petition and is

☒ reported at In re Wilbanks 2018 Tex. Crim. App. Lexis 535; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the Second Court of Appeals court appears at Appendix D to the petition and is

☒ reported at Wilbanks V. State 2018 Tex. App. Lexis 571; 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 October 23, 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: Exhibit D 1 of 1, and a copy of the order denying rehearing appears at Appendix E.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (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 Sept. 18, 2019.
A copy of that decision appears at Appendix B (pg. 104-1519).

☒ A timely petition for rehearing was thereafter denied on the following date: Oct. 2019, and a copy of the order denying rehearing appears at Appendix No Copy.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. A.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States ~~six~~ Amendment of the Constitution
2. Fed. R. 11 (a) (governing § 2254 application)
3. Fourteenth Amendment of the United States Constitution.

STATEMENT OF THE CASE

1. It was recommended that the Court none-the-less addressed whether the Petitioner would be entitled to a certificate of appealability (Wilbanks v. Dir. Tex. Dep. of Crim. Just. Corr. Div. 2022 Dist. Lexis 239525 *47). The Court order that the case [to be] dismissed with prejudice. (Wilbank V. Dir. Tex. Dep. of Crim. Just. Corr. Div. 2023 Dist. Lexis 36901 (5th Cir. 2023) Appendix B. The Court did not issue or denied a COA.

2. Re: Trial transcript

The Court: I don't know. I don't know what the facts are of those other instances. And I think is going to be - it's very prejudicial. And I don't think that is proper fodder for impeachment. And I'm not going to let you ask her about it. (Appendix E) (B 3 of 3 pg. 146)

REASONS FOR GRANTING THE PETITION

6. Under Fed R. 11(a) that govern § 2254 application, a District Judge should issue or deny any certificate of appealability (COA). Petitioner applied for a COA to the 5th Cir. Court of Appeals overlooking the Fed. R. 11(a) in the quest of a constitutional claim. The Fifth Circuit denied the COA because Petitioner failed to brief and argue the claim in the application for COA. (Appendix A) *Wallace V. Mississippi*, the court states: as noted our Court through a single Judge, granted Wallace the COA on the claim but "because a ruling by a Judge in the initial stages of is appeal [492] not binding on later merits, panel, we have the responsibility to determine whether the [COA granting review of the claim] is valid. *Black V. Davis* 902 F.3d 541, 544 (5th Cir 2018)

In the District Court Postjudgment order (Appendix E Exhibit C) The Judge denied a COA; but this denial of the Postjudgment never got enter to the Magistrate Final Judgment as per Fed R. 11(a) (Appendix A Exhibit pg. ID 1589); indicating a failure to issue or deny a COA by the Court. The Fifth Circuit lacked Jurisdiction in this matter to deny a COA. *Black V. Davis* 902 F.3d 541 (Sept. 5, 2018); *Ramirez Cardenas V. Thaler* 902 F.3d 442 (Aug. 22 2011)

The Judge's amend on this issue are not posted on the Judge's opinion anywhere. It looks like ~~the~~ ~~motion~~ the Clerk of this District did not take this matter to the Court's Judge. The Clerk is the one responding that the ^{REHEARING} motion was untimely. (Appendix E, Exhibit D). In *Tanner V. Harris* 776 F.3d 434, 436,

443-44 (6th Cir 2015) Prose petitioner, whose "effort to file a timely" notice of appeal was thwarted by guard at the prison where she was incarcerated" and whose "notice was filed a day late" is granted Rule 60(b)(6) relief of vacatur of indigement denying habeas corpus petition - along with the re-entry of judgment - thereby starting a new the 30 day period under Rule 4(a)(1)(A) in which to file Rule 4(a)(5) motion to extend to appeal is excused because prisoner "had no reason to think that her appeal was flawed until we issued the show-cause order... almost two weeks beyond the date when a motion to extend under Rules 4(a)(5)(A) would have been timely)

2. In trial defense counsel objected to the Court. The objection is not clear to "what is the problem" but to "what could be the problem". In trial, Prosecution, defense, and Judge argued in the context of the objection, relevance on the merits but never conducted a hearing ^(R. 412) for "fact finding" if any of the other allegations were true or not; pertaining the accusers credibility, failing to produce evidence of where the limitation of the cross examination should be if any. The Court knowingly made a decision that the evidence at hand was prejudicial without conducting any kind of hearing. ^(R. 412) Petitioner had entered evidence (Appendix D Exhibit State Court of Appeal (2nd District Memorandum pg. 11) into trial record producing a letter of one instance of the other allegations, that the accuser made where not true. (Appendix E, Exhibit A 5 of 5) by prior accused

Person that was a family member as to all the other allegations.

The Court's decision of prejudicial violated the Confrontation Clause of the applicant.

The role of federal Courts in reviewing habeas Corpus petition by prisoners seeking federal habeas Corpus must be assert a violation of ~~Fed~~ Federal Constitution rights. *Lowerly V. Collins* 988 F.2d 1354, 1367 (5th Cir 1993) *Malchi V. Thaler* 211 F.3d 953, 957 (5th Cir 2000) The Statutory Provision requires federal Court to be deferential to habeas Corpus decision on the merits by the State Courts. *Moore V. Cockrell* 313 F.3d 880, 881 (5th Cir 2002); *Renico V. Lett* 559 U.S 766, 773 (2010).

Fed R. Evid. 608 in pertinent part permit an attack on a witness's credibility by opinion or reputation evidence with restrictions and in the discretion of the court, by cross-examination of the witness directed to specific instances of prior untruths. If however a defendant of a sexual assault case is able to show by clear and convincing evidence that the putative complainant has previously made "demonstrably false allegation, the evidentiary rules shift in favor of admissibility. *Chretien V. N.H. State Prison* 2008 DNH 84, 2008 US Dist. Lexis 33217.

The U.S. Supreme Court has declared cross-examination an essential constitutional right for a fair trial, subject to "reasonable limits"

In *White V. Coplan* the prior allegations

resembles similarities to each other but ultimately the girls recanted to their allegations of the prior allegations to white. (*22) White argued that the evidence bore upon Credibility of prior sexual knowledge. The trial Judge ultimately prohibited all enquiry into the prior allegations.

The resembles of White's case to petitioner are great. The evidence bore directly on credibility. The accusation "demonstrate false" at least one of the other allegations and would of had to cross-examine to find the fact findings of the other allegations "to be consider" as equal protection of the law ^(R-412) constitution. White V. Coplan 399 F.3d 18 (1st Cir. 2005)

On Certiorari, the United States Supreme Court vacated the judgment above and remanded the case for further proceedings. In opinion by Rehnquist, join by Burger, Ch. J; and Brennan, Blackmun, Powell and O'Connor, it was held (1) that the trial court ruling, by cutting off all questions about an event that the prosecution conceded had taken place and that the jury might reasonably have found furnish the witness motive for favoring the prosecution in his testimony, had violated the accused right secured the confrontation clause of the six amendment regardless of whether it had affected the outcome of the trial; but (2) that the constitutionally improper denial of an accused's opportunity to impeach a witness

for bias is not grounded for an automatic reversal of a conviction but is subject to a harmless error analysis. Under which the correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a viewing court might nonetheless say that the error was harmless beyond reasonable doubt; and (3) that the state Supreme Court's automatic reversal rule would be read as resting on federal law and thus subject to review by the United States Supreme Court, in the absence of a plain statement that it rested on the state law grounds. Del. v. Van Arsdall 475 US 673

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

David Willbanks, Pro Se

Date: JAN 21ST 2024