

23-7039

No. _____

FILED
FEB 28 2024

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

EVERETT WEBB — PETITIONER
(Your Name)

VS.

BOBBY LUMPKIN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

EVERETT DALE WEBB TDCJ # 2136986

(Your Name)

O.B. ELLIS UNIT, 1697 FM 980

(Address)

HUNTSVILLE, TEXAS 77343

(City, State, Zip Code)

N/A

(Phone Number)

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

QUESTION(S) PRESENTED

1. Whether the court of appeals erred in concluding that Petitioner's double jeopardy claim was unexhausted or procedurally defaulted?
2. Whether the court of appeals erred in concluding that Petitioner's ineffective assistance of appellate counsel claim failed to make a showing of denial of a constitutional right on Petitioner's double jeopardy claim?

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	<i>passim</i>
CONCLUSION.....	12

INDEX TO APPENDICES

APPENDIX A Fifth Circuit Court of Appeals Unpublished Order Dec. 4, 2023

APPENDIX B United States District Court, Southern District of Texas Mem.
Opinion and Order March 28, 2023

APPENDIX C

APPENDIX D

APPENDIX E

APPENDIX F

TABLE OF AUTHORITIES CITED

CASES

	PAGE NUMBER
Barefoot v. Estelle, 463 U.S. 880(1983)	7
Blockburger v. U.S., 284 U.S. 299(1932)	9,11
Evans v. Michigan, 568 U.S. 313(2013)	8,9,11
Evitts v. Lucey, 469 U.S. 387(1985)	10
Slack v. MaDaniel, 529 U.S. 473(2000)	7,12

STATUTES AND RULES

28 U.S.C. § 2253(c)(2)	7,12
Tex. Pen. Code § 21.11	8
Sup. Court Rule 10	passim

OTHER

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 is unpublished.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 _____ 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 December 4, 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: _____, 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. § 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

U.S. CONSTITUTION FIFTH AMENDMENT

The Fifth Amendment provides that: no person shall be subject for the same offense to be twice put in jeopardy.

U.S. CONSTITUTION SIXTH AMENDMENT

The Sixth Amendment provides that: the defendant shall be entitled to effective assistance of counsel.

U.S. CONSTITUTION FOURTEENTH AMENDMENT

The Fourteenth Amendment provides that: no person shall be denied due process of law.

U.S.C. § 2253(c)(2)

A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

Tex. Pen. Code § 21.11(c)(2)

A person commits an offense if, with a child younger than 17 years of age, whether the child is the same or opposite sex and regardless of whether the person knows the age of the child at the time of the offense, engages in sexual contact with the child by touching. In this section, "sexual contact" means the following acts, if committed with the intent to arouse or gratify, any touching of a child's genitals or breast.

STATEMENT OF THE CASE

The facts necessary to place in their setting the questions now raised can be briefly stated:

I. Course of proceedings in the state court criminal conviction.

On March 22, 2017, in a cause before the 85th Judicial District Court in Brazos County, Texas, in trial court no. 14-03111-CRF-85, styled State of Texas v. Everett Dale Webb, Petitioner was found guilty by a jury on a one count indictment of Indecency with a child by contact of a breast by violation of Texas Penal Code § 21.11(a),(c).

On April 24, 2017, the trial judge sentenced Petitioner to 75 years confinement in the Texas Department of Criminal Justice after finding in the affirmative of Petitioner's prior felony conviction that enhanced his punishment.

On May 15, 2019, the Tenth Court of Appeals of Texas affirmed the trial court judgment in a published opinion. Webb v. State, 575 S.W.3d 905 (Tex.App.-Waco 2019, pet. ref'd). On October 9, 2019, the Texas Court of Criminal Appeals refused Petitioner's state petition for discretionary review. Webb v. State, PD-0551-19 (Tex.Crim.App.2019).

On December 15, 2020, Petitioner filed his first state habeas corpus application challenging the state court conviction. On August 25, 2021, the Texas Court of Criminal Appeals denied the application without a written order. Ex Parte Webb, No. 92,920-01 (Tex.Crim.App.2021). Petitioner sought to supplement his state habeas corpus applications by filing two additional applications on October 11, 2021, and November 3, 2021, respectively. These supplemental applications received no ruling on the merits. See *id.*

On January 4, 2021, Petitioner filed his federal petition for writ of habeas corpus and an amended petition on November 29, 2021. On March 28, 2023, the United States District Court for the Southern District of Texas, Houston Division, granted Respondent's request for summary judgment and denied Petitioner a certificate of appealability.

On December 4, 2023, the United States Court of Appeals for the Fifth Circuit denied Petitioner a certificate of appealability. This writ of certiorari followed.

II. Relevant facts concerning the underlying conviction.

The bulk of Petitioner's facts are contained in his 28 U.S.C. § 2254 federal habeas petition and the Certificate of Appealability. Nonetheless, Petitioner apprises the Court of pertinent facts relevant to the case at bar.

On September 26, 2013, Bryan, Texas Police Officer Dunford was dispatched to a report of child injury.(Trial Record, RR4:11). The alleged victim, R.G., was 16 years old and appeared visibly shaken, but there was no reported injuries or damaged clothing. Id at 12,20. Officer Dunford reported the incident as indecency with a child by contact. Id at 14.

R.G. was 19 years old by the time of trial, but was 16 at the time of the incident and living with her grandmother.(RR4:30,32). On the evening of September 26, Petitioner offered R.G. a ride to take her where she needed to go. Id at 34-36. During the course of the ride, R.G. became nervous and began sending texts from her phone. Id at 39.

After a brief drive, Petitioner drove to a nearby park, and according to R.G., Petitioner grabbed her, ripped her tanktop and bra, starting kissing her neck, ear and breast, and attempted to remove her shorts but was unsuccessful. Id at 40-43. Petitioner drove R.G. to her residence, and despite this alleged

incident, the police were not immediately called.(RR4:47).

During trial, the state was permitted to call two extraneous offense witnesses that testified about alleged sexual misconduct by Petitioner.(RR4:69-135).

After the state rested its case-in-chief, Petitioner's trial attorney moved for a directed verdict against the indictment regarding the offense of genital contact.(RR4:136). After some discussion, the court granted the request for a directed verdict against the sexual offense of genital contact, but left in place the charge for touching of the breast for jury consideration. (RR4:142); (CR:48-49). Petitioner was ultimately convicted of the "touching" offense involving the breast. Id.

REASONS FOR GRANTING THE PETITION

ISSUE 1: The court of appeals erred in concluding that Petitioner's double jeopardy claim was unexhausted or procedurally defaulted.

Petitioner contends that the Fifth Circuit Court of Appeals' ("Fifth Circuit") decision finding that Petitioner's double jeopardy claim was unexhausted or procedurally defaulted was in error. The decision to deny a Certificate of Appealability ("COA") should have been issued on Petitioner's federal petition Ground Eight.

A. The court of appeals decision conflicts with decisions of the Court.

A COA may issue only upon the "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595(2000). When a district court has denied relief on the merits, a COA applicant "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claim debatable or wrong." *Id.* If the district court's denial of relief is based on procedural grounds, a COA may not issue unless the prisoner shows that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

The standard requires a "showing that reasonable jurists could debate whether ... the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" Slack, supra; Barefoot v. Estelle, 463 U.S. 880,893(1983).

A writ of certiorari is warranted because the Fifth Circuit has decided a federal question of law that conflicts with decisions of this Court. U.S. Sup. Court Rule 10(c). In the alternative, certiorari is warranted because the Fifth Circuit has departed from the accepted and usual course of judicial proceedings

or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. U.S. Sup. Court Rule 10(a).

B. The importance of the issue presented for resolution.

This case presents an important question for resolution, in that, the Fifth Circuit has arbitrarily denied a COA on a constitutional and procedural question leaving Petitioner without adequate remedy at law to undo a double jeopardy violation. According to the Fifth Circuit, Petitioner failed to demonstrate the denial of a constitutional right and that the district court erred in its procedural ruling.(See Appendix A); see also, Webb v. Lumpkin, 2023 U.S. App. LEXIS 32559(5th Cir.2023).

Under the U.S. Constitution's Fifth Amendment, no criminal defendant shall be placed twice in jeopardy in criminal prosecutions. See Evans v. Michigan, 568 U.S. 313(2013).

In Petitioner's case, he was charged by a one count indictment for indecency with a child by contact for the touching of R.G.'s genitals and breast. See Tex. Pen. Code § 21.11. After the state presented its evidence, defense counsel moved for a directed verdict against the genital contact portion of the count arguing no evidence was presented to support the charge. (RR4:136). The trial judge directed a verdict against the genital allegation, but submitted the touching of the breast allegation to the jury for deliberations.(RR4:142); (CR:48-49).

Petitioner argues that upon the trial judge finding no evidence supported the genital contact allegation, he was obligated to enter a directed verdict against the breast touching allegation as well, as both flowed from the same alleged criminal conduct and are enumerated under the same statutory law. See Tex. Pen. Code § 21.11(c)(2).

Petitioner propositions this upon this Court's findings in Blockburger v. U.S., 284 U.S. 299(1932), in that, because the indecency charge requires for the state to prove that Petitioner had an intent to arouse or gratify by the contact, "Blockburger" analysis bars the touching of the breast prosecution because both require proof of the same facts. Since the state was unable to prove the elements for conviction on the genital contact, it follows that no evidence could have been presented to support the breast touching allegation because both alleged offenses are the same offenses for "double jeopardy" purposes.

Although rarely utilized, Tex. Code Crim. Pro. Art. 45.032 mandates that a directed verdict of "not guilty" be entered upon a finding that the state has failed to make out a *prima facie* case as alleged in the charging instrument. Petitioner's defense counsel moved to invoke that rarely used law, and even though the judge granted a directed verdict against the genital contact charge, he refused to do so on the touching of the breast charge. In other words, the judge "severed" the allegations into two(2) distinct criminal accusations despite them being alleged in a one count indictment.

As this Court has said in *Evans*, "acquittals are substantive rulings that conclude proceedings absolutely, and raise significant double jeopardy concerns." Evans, 568 U.S. at 313.

Petitioner presented his double jeopardy claim in a state habeas corpus proceeding. (See USDC Dkt. Nos. 31-31, 31-32). The double jeopardy claim was "punted away" by the Texas Court of Criminal Appeals ("TCCA") receiving no merits adjudication. *Id.* For purposes of exhaustion, Petitioner did, in fact, present his double jeopardy claim to state courts, and any argument or finding that says otherwise is flawed and an erroneous interpretation of law.

Review by certiorari is warranted. Sup. Ct. Rule 10(a),(c).

ISSUE 2: The court of appeals erred in concluding that Petitioner's ineffective assistance of counsel claim on direct appeal was not a substantial showing of denial of a constitutional right with regard to failing to raise the continuation of trial after a directed verdict was error.

Petitioner contends that the Fifth Circuit's decision finding that his ineffective assistance of counsel ("IAC") against his appellate counsel was erroneous, and that the decision to deny a COA was error.

A. The court of appeals decision conflicts with decisions of the Court.

As an initial matter, Petitioner incorporates by reference his standard of review as cited in Section A of Issue 1.

B. The importance of the issue presented for resolution.

This case presents an important question for resolution, in that, the Fifth Circuit has arbitrarily denied a COA on a constitutional ground leaving Petitioner without an adequate remedy at law to resolve an IAC claim. According to the Fifth Circuit, Petitioner failed to demonstrate the denial of a constitutional right. (See Appendix A).

Under the Sixth and Fourteenth Amendments of the U.S. Constitution, a criminal defendant is entitled to the effective assistance of counsel on direct appeal. Evitts v. Lucey, 469 U.S. 387 (1985).

For brevity, Petitioner incorporates by reference the substantive facts regarding the criminal accusations against him, trial counsel's action of moving for a directed verdict and the court's granting thereto, in part, and the law as cited in Section B of Issue 1.

On appeal, Petitioner's counsel did not raise this issue and instead focused his attention on other less meritorious claims. The importance of the double jeopardy claim cannot be overstated.

Under Blockburger, Petitioner should not have been convicted of the touching of the breast accusation because the genital contact accusation had a directed verdict against it. As this Court has said in Evans, acquittals are substantive rulings that conclude proceedings absolutely, and raise significant double jeopardy concerns. Evans, 568 U.S. at 313.

Because Petitioner presented a Sixth Amendment and Fourteenth Amendment violation of IAC against his appeal counsel, a constitutional claim had been raised in the federal proceeding because Petitioner argued a Fifth Amendment claim should have been raised, but was not. Petitioner's claim here in the epitome of constitutional error, and the appeal court made an erroneous conclusion that Petitioner did not present such a claim.

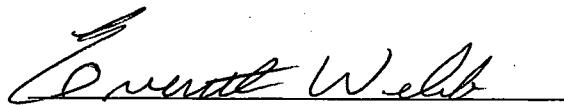
Review is warranted by way of certiorari. Sup. Ct. Rule 10(a),(c).

CONCLUSION

Petitioner argues that he entitled to a COA. 28 U.S.C. § 2253(c)(2); slack, 529 U.S. at 484.

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 2-28-24