

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RYAN PATRICK JOHNSON — PETITIONER
(Your Name)

VS.

LORIE DAVIS, DIRECTOR, TDCJ-CID — 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

RYAN PATRICK JOHNSON
(Your Name)

MARK W. STILES UNIT, 3060 FM 3514
(Address)

Beaumont, Texas 77705
(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:

QUESTION(S) PRESENTED

1. Was the Federal District Court correct in reviewing the Petitioner's Ineffective Assistance claims under a "Doubly" deferential standard of review and denying relief?
2. Was the United States Court of Appeals for the Fifth Circuit correct in Affirming such a "Doubly" deferential standard and denying relief?
3. Is there a reasonable probability that one reasonable juror could determine that the Petitioner's trial counsel was ineffective in failing to object to a testifying witness giving in-court accounts of out-of-court statements allegedly made by the victim, violating the hearsay rule and the confrontation clause of the 6th Amendment, for failing to impeach the testimony of investigator, Robert McCarver, and for failing to impeach the testimony of Brittany Robinson?

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Burt v. Titlow, 134 S.Ct. 10,13 (2013).....	6,7,8
Streckland v.Washington,104 S.Ct.2052 (1984).....	7
Funk v.Stryker, 631 F.3d 777 (5th Cir.2011).....	8
Buck v.Davis,137 S.Ct.759 (2017).....	8,9,10
Miller El v.Cockrell,123 S.Ct.1029 (2003)	10
Crawford v.Washington,124 S.Ct.1354 (2004).....	11
Melendez-Diaz v.Massachusetts, 129 S.Ct.2527 (2009)..	11
Fuller v. State,224 S.W.3d 832,837 (Tex.App.-Texarkana 2007)	12,13
Young v. Dretke,356 F.3d 616 (2004).....	13
Hall v.State,161 S.W.3d 142 (Tex.App.-Texarkana 2005)..	15
Walker v. State,195 S.W.3d 250 (Tex.App.-San Antonio 2006)	15
Catalan v.Cockrell,315 F.3d 491 (5th Cir.2002).....	15

STATUTES AND RULES

28 U.S.C. §2254 (b) (1) (2)	3,10
Federal Rules of Evidence 801 (a) (c).....	3
Federal Rules of Evidence 802.....	3
28 U.S.C. §2254.....	4
Fed.R.Evid. 801 (a) (c).....	11

OTHER

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3-
STATEMENT OF THE CASE	4-5
REASONS FOR GRANTING THE WRIT	6-15
CONCLUSION.....	16

INDEX TO APPENDICES

APPENDIX A -- Opinion of United States Court of Appeals for the
Fifth Circuit

APPENDIX B -- Opinion of United States District Court for the
Eastern District of Texas—Texarkana Division

APPENDIX C -- Report and Recommendation of United States Federal
Magistrate

APPENDIX D

APPENDIX E

APPENDIX F

Note Opinion of District Court and
recommendation of Magistrate contained,
within petitioner's application for COA*

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

☐ 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 September 13, 2017.

☒ 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

1. 28 U.S.C. §2254(d)(1)(2)

If a convicted State criminal defendant can show that his conviction rests upon a violation of the United States Constitution, he may obtain a writ of habeas corpus that requires a new trial, a new sentence, or release.

2. Amendment 6 of the Constitution of the United States

In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses for obtaining witnesses in his favor, and to have effective assistance of counsel for his defense.

3. Amendment 14 of the Constitution of the United States

No State may deprive any person of life, liberty, or property, without due process of law; nor deny any person equal protection of the laws.

4. Federal Rules of Evidence 801(a)(c)

"Hearsay" is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. Hearsay is not admissible.

5. Federal Rules of Evidence 802

If a statement is testimonial it is inadmissible unless the declarant is unavailable and the defendant has had a prior opportunity for cross-examination.

STATEMENT OF THE CASE

The Petitioner was convicted of murder in the 102nd Judicial District Court, Bowie County, Texas. The Petitioner was sentenced to 99 years of confinement. The Sixth Court of Appeals, Texarkana, Texas, Affirmed his conviction of January 26, 2011. The Petitioner filed his State application for Habeas Corpus relief and alleged among other grounds that his trial counsel was constitutionally ineffective for failing to object to the out-of-court statements of a non-testifying witness being entered before the jury in the testimony of the State's primary witness; counsel was ineffective for failing to effectively impeach the testimony of Bowie County Sheriff's Investigator, Robert McCarver; counsel was ineffective for failing to effectively impeach the testimony of Brittany Robinson. The Petitioner's State application was denied without written order.

The Petitioner then filed a timely application for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254. The Federal Magistrate Judge filed a recommendation that the Petitioner should be denied relief because his ineffective assistance of counsel claims did not meet a "Doubly" deferential standard of review. The Petitioner timely filed objections to the Magistrate's recommendation.

However, the Federal District Court denied the Petitioner relief and a certificate of appealability on September 8, 2016. Citing and adopting the Magistrate's recommendation, the District Court also determined that the Petitioner must meet a doubly deferential standard in his ineffective assistance of counsel claims. The Petitioner filed a timely notice of appeal and an application for COA in the United States Court of Appeals for the Fifth

STATEMENT OF THE CASE (Continued)

Circuit denied the Petitioner's application for COA on September 13, 2017. The Petitioner now files this timely Writ of Certiorari in the Supreme Court of the United States

REASONS FOR GRANTING THE PETITION

THE UNREASONABLE STANDARD OF REVIEW

1. The Petitioner asserts that the federal magistrate and the Federal District Court adopting the Magistrate's recommendation and reviewed the Petitioner's Ineffective Assistance of Counsel claims under an unreasonable application of established Federal law. Both the Magistrate and the District Court Judge contends that the Petitioner must overcome a "doubly deferential" standard of review in order to show Ineffective Assistance of Counsel. The Magistrate Judge, in her recommendation, clearly applies this unreasonable application of established Federal law, SEE: (Magistrate Judge's Recommendation, pp.9)...

"The deferential standard applicable to Federal Habeas review requires Federal court's to apply a "doubly deferential" standard of review to claims of ineffective assistance of counsel."

The District Court adopts this unreasonable application of established Federal law in its memorandum, SEE: (District Court's Memorandum Adopting the Magistrate Judge's Recommendation, pp.4)...

"As the Magistrate Judge points out, strategic decisions by counsel are to be reviewed under a "doubly deferential standard."

The Magistrate Judge and the District Court Judge cited Burt v. Titlow as the prevailing case for their standard of review, SEE: Burt v. Titlow, 134 S.Ct. 10,13 (2013)...

The Petitioner asserts that by adopting such an unreasonable standard of review, the District Court has erected an impossible barrier that NO Petitioner could overcome, no matter how egregiously ineffective counsel may have been, or

REASONS FOR GRANTING THE PETITION (Continued)

how unreasonable a State Court's decision making in a Petitioner's case; this the Petitioner contends is "objectively unreasonable". Burt v. Titlow Specifically determined that when a State prisoner asks a Federal Court to set aside a sentence due to Ineffective Assistance of Counsel during plea-bargaining, a doubly deferential standard is to be used, SEE: Burt v. Titlow, 134 S.Ct. 10,13 (2013)...

"When a State prisoner asks a Federal court to set aside a sentence due to ineffective assistance of counsel during plea bargaining, Judicial precedent requires the Federal court use a doubly deferential standard of review that gives both the State and the defense attorney the benefit of the doubt."

This standard is specifically attached to such a case, because the defendant admitted guilt and accepted a plea bargain offer. The constitutionality of the defense counsel's assistance and the State's conduct during the plea-bargain process must both be deferred to as reasonable. This has nothing to do with the Petitioner's case. The Petitioner asserted his innocence and went to trial where he was found guilty by a jury. The governing established Federal law in determining the standard of review for Ineffective Assistance of Counsel was clearly determined in: Strickland v. Washington, 104 S.Ct. 2052 (1984)...

"Counsel is ineffective when counsel has performed deficiently and that performance has prejudiced his client's defense."

The standard set forth in Strickland has long been established as law by this Honorable Court. The Magistrate Judge and the District Court Judge both place an unreasonable and unconstitutional burden on the Petitioner by applying Burt v.

REASONS FOR GRANTING REVIEW (Continued)

Titlow, 134 S.Ct. 10,12 (2013) to support the decision to deny the Petitioner's Ineffective Assistance of counsel claims. The Petitioner asserts that the District Court's ruling fits the very definition of unreasonableness by creating a Standard of Review that is itself unreasonable based on the Court's misinterpretation of the law, and was in fact, an Abuse of Discretion, SEE: Funk v. Stryker, 631 F.3d 777 (5th Cir.2011)...

"The Court commits an abuse of discretion when its ruling is based on an erroneous view of the law that is itself unreasonable."

The District Court also erred by denying the Petitioner's COA on his Ineffective Assistance of Counsel claims since, only a reasonable probability that a reasonable jurist could disagree with its resolution of the Petitioner's claims is required for COA to issue, SEE: Buck v. Davis, 137 S.Ct. 759 (2017)...

"The only question is whether jurists of reason could disagree with the District Court's resolution of a petitioner's constitutional claim. If so, then an appeal should issue."

2. The Petitioner asserts that the United States Court of Appeals for the Fifth Circuit reviewed the Petitioner's Application for COA under an unconstitutional and unreasonable application of established Federal law by deciding the actual merits of the Petitioner's ineffective assistance of counsel claims, then based its denial of the Petitioner's COA on its determination of the actual merits. This is error. SEE: Buck v. Davis, 137 S.Ct. 759 (2017)...

"When a court of Appeals justifies its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction."

The Petitioner asserts that the Court of Appeals affirmed the

REASONS FOR GRANTING REVIEW (Continued)

District Court's constitutionally unreasonable "doubly deferential" standard of review by failing to apply the correct COA process. The Petitioner contends that the determination of prejudice for COA is whether or not there is a reasonable probability that jurists of reason could disagree with the District Court's decision. SEE: Buck v. Davis, 137 S.Ct. 759 (2017)...

"At the COA stage, the only question is whether the Applicant has shown that jurist of reason could disagree with the district court's resolution of his constitutional claims."

Instead, the Fifth Circuit based its denial of the Petitioner's COA on what appears to be the consideration of the merits themselves. The Petitioner contends that the Fifth Circuit was intentionally vague in its reasoning on denying a COA on his ineffective assistance of counsel claims, despite the fact that it cites Buck v. Davis. SEE: Order By the Fifth Circuit, pp.2 (Appendix, Exhibit A)...

"Further, Johnson is Denied a COA on his claims of ineffective assistance of counsel because he has not met the required standard."

The Petitioner asserts that the Fifth Circuit's statement of the required standard is insufficient and no reasonable jurist could determine whether it meant the "doubly deferential" standard used by the District Court, the two-prong standard of Strickland, or the COA process discussed in Buck v. Davis, 137 S.Ct. 759 (2017). Based on the entirety of the order, the Petitioner asserts that the Fifth Circuit erred by making an determination of the merits of his claim and placed an undue burden on the Petitioner, prejudicing his claims. SEE: Miller-

REASONS FOR GRANTING REVIEW (Continued)

El v. Cockrell, 123 S.Ct. 1029 (2003); Buck v. Davis, 137 S.Ct. 759 (2017).....

"When a reviewing Court inverts the statutory order of operations and first decides the merits of an appeal then justifies its denial of a COA based on its adjudication of the actual merits, it has placed too heavy of a burden on the prisoner at the COA stage."

The Petitioner humbly asks this Court to reverse the judgment of the United States Court of Appeals for the Fifth Circuit, and the judgment of the United States District Court, and Remand the Petitioner to the Trial Court for a New Trial—as a result of his trial counsel's deficient performance which prejudiced the Petitioner's defense.

3. The Petitioner asserts that his trial counsel was constitutionally ineffective for failing to object to the hearsay testimony of Tracy Dixon, and the District Court's ruling adopted from the Federal Magistrate's recommendation that "Federal Courts are required to apply a doubly deferential standard of review that the Petitioner is required to overcome" is an unreasonable application of established Federal law as determined by the Supreme Court, entitling the Petitioner relief under 28 U.S.C. §2254(d)(1)(2)

Tracy Dixon testified at trial that the Petitioner had called her son's cell phone and that there was a relationship between the victim and the Petitioner. When the prosecutor asked Ms. Dixon how long the relationship lasted, she testified that her son had told her that he had purchased a gift for Petitioner for their fifth year anniversary. That Petitioner never

REASONS FOR GRANTING REVIEW (Continued)

himself to her when he allegedly called the house, but that she would "hear Derrick call his name" (RRv.4,pp.31), and that she would give the victim money and she would ask him "where is your money? And he was like well", "I had to help a friend." This hearsay testimony prejudiced the Petitioner to the jury by implying a long-term relationship that did not exist and dependence by Petitioner on the victim, which did not occur. This testimony consisted of statements made by the victim, or statements Ms. Dixon alleges to have overheard during phone conversations by the victim. This testimony fits the very definition of hearsay and as such was inadmissible. Trial counsel's failure to object to this prejudicial testimony caused the jury to accept both Ms. Dixon's testimony and the State's allegations as reliable facts, causing the Petitioner egregious harm. Trial counsel's failure to object to such testimony allowed a violation of not only the hearsay rule, but the confrontation clause as well. SEE: Crawford v. Washington, 124 S.Ct. 1354 (2004); Fed.R.Evid. 801(a)(c)...

"The confrontation clause and the hearsay rule cover statements offered as proof of fact at trial and as such are inadmissible."

Ms. Dixon's in-court description and verbatim accounts of out-of-court statements allegedly made by the victim, clearly violated both the hearsay rule and the confrontation clause. Allowing such testimony creates a separate class of witnesses helpful to the prosecution, but exempt from the Petitioner's Sixth Amendment protections. This is clearly contrary to established Federal law. SEE: Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009)...

REASONS FOR GRANTING REVIEW (Continued)

"The text of the Sixth Amendment contemplates two classes of witnesses, those against the defendant and those in his favor. The prosecution must produce the former, the defendant may call the latter. There is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation."

The Petitioner asserts that for his trial counsel to fail to object to such inadmissible testimony had a harmful effect on the jury's decision making and what trial counsel claimed was part of his trial strategy, was in actuality, no trial strategy. SEE: Trial Counsel's Affidavit In Response To Petitioner's State Habeas Petition, Quoted In Part In Federal Magistrate's Recommendation, pp.8...

"It was a valid trial strategy to allow testimony regarding the familiarity between the victim and the Petitioner. In fact, the admitted hearsay showed the disparity of perceptions of the alleged relationship between the victim and the Petitioner."

The Petitioner asserts that trial counsel was clearly ineffective for allowing hearsay testimony, unsupported by facts, to even be considered by the jury, since perception clearly harmed the Petitioner. No constitutionally effective counsel would have failed to object to hearsay testimony, unsupported by fact, which raised the possibility of a relationship that did not exist in fact. And that assertion being an integral part of the Petitioner's defense. There was no familiarity, no relationship. The Petitioner was being stalked by somebody he had no relationship with and counsel's failure to object to inadmissible testimony claiming different allowed the jury to consider evidence it should have never been allowed to consider. Counsel's failure to object clearly harmed the Petitioner. SEE: Fuller v. State, 224 S.W.3d

REASONS FOR GRANTING REVIEW (Continued)

832,837 (Tex.App.--Texarkana 2007)...

"Counsel's failure to object to inadmissible testimony was in essence, no strategy and was ineffective."

The Petitioner asserts that had his trial counsel objected to such inadmissible testimony, there is a reasonable probability that the trial court would have sustained such an objection. There is also a reasonable probability that the jury, not having to consider the existence of a relationship raised by inadmissible testimony, may have reached a different verdict. SEE: Young v. Dretke, 356 F.3d 616 (2004)...

"That as a result of counsel's deficient performance, there is a reasonable probability that the outcome may have been different."

The Petitioner asserts that his trial counsel failed to effectively impeach the testimony of Investigator Robert McCarver of the Bowie County Sheriff's Department, prejudicing the Petitioner's defense. On direct examination, Investigator McCarver testified that the Petitioner's crying during his video-taped interview was based solely on remorse for himself, not the victim. While trial counsel did get Investigator McCarver to admit that his opinion of the Petitioner's crying was based on speculation, McCarver also stated that what he viewed as an absence of remorse or sympathy for the victim by the Petitioner, was supported by comments allegedly made by the Petitioner during the interview. SEE: (RR.v.3,pp.129)

Q: So if he was having any sympathy there or whether or not, that was just your opinion, was it not?

A: No sir, he actually made some comments during that time, but still speculation beyond that.

REASONS FOR GRANTING REVIEW (Continued)

This Statement by Investigator McCarver is clearly ambiguous at best and infers that the Petitioner made statements during the interview, which led McCarver to believe the Petitioner had no sympathy for the victim or remorse over the victim's death. This is not effective impeachment of the witness by trial counsel. In fact, counsel could have easily reviewed the taped interview of the Petitioner to determine what comments Investigator McCarver was referring to. The Petitioner asserts that he told his counsel that he had made no such comments and had his trial counsel pursued that line of questioning, he would have revealed to the jury that Mr. McCarver's testimony was unreliable and would have impeached him as an unreliable witness. There is no reasonable trial strategy that would justify such a failure by trial counsel. The Petitioner asserts that his trial counsel was constitutionally ineffective for failing to impeach the testimony of Brittany Robinson, prejudicing the Petitioner's defense.

Trial counsel failed to object to the inconsistent testimony of Ms. Robinson who claimed under direct examination by the prosecutor that the victim and the Petitioner were romantically involved. Trial counsel's failure was particularly harmful to the Petitioner because it amounted to hearsay testimony that bolstered the previous inadmissible testimony of Tracy Dixon that "An ongoing relationship existed between the victim and the Petitioner." This testimony

REASONS FOR GRANTING REVIEW (Continued)

amounted to hearsay with no supportable fact. Counsel's failure to object to such testimony caused extraneous matters that did not exist in the record to be introduced to the jury, causing the Petitioner egregious harm. SEE: Hall v. State, 161 S.W.3d 142 (Tex.App.-Texarkana 2005)...

"Counsel was ineffective for failing to object to the admission of extraneous matters."

Trial counsel also failed to effectively impeach the testimony of Brittany Robinson. While it is true that trial counsel managed to have Ms. Robinson acknowledge that she had never seen the victim and the Petitioner involved in a sexual act, this did little to dispel the allegation of a romantic relationship, since any rational trier of fact would hardly discount the possibility of a relationship because a third party was not an eyewitness to a sex act. Such a conclusion would not be reasonable. Counsel's failure to object to what amounted to hearsay testimony and then fail to effectively impeach such inadmissible and harmful evidence was deficient performance by trial counsel and that deficient performance clearly prejudiced the Petitioner's defense. SEE: Walker v. State, 195 S.W.3d 250 (Tex.App.-San Antonio 2006); Catalan v. Cockerell, 315 F.3d 491 (5th Cir.2002)...

"Counsel's numerous deficient acts and omissions, in their totality, prejudiced the accused's defense."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,


Date: December 31, 2017