

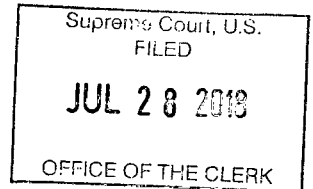
18-6685

Term

In the Supreme Court of the
United States

Bruce Randol Merryman
Petitioner
VS.

Lorie Davis, Director of
T.D.C.J.
Respondent



Petition for Writ of Certiorari to
The United States Court of Appeals
For the Federal Circuit

Petition For Writ of Certiorari

Respondent

Lorie Davis, Director of
Texas Department of Criminal
Justice, Correctional Institutions
Division

Attorney for Respondent

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Petitioner

Bruce Randol Merryman
T.D.C.J. no. 1730381
McCounell Unit
3001 S. Emily Dr
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Pro Se

Question Presented

Under the Antiterrorism and Effective Death Penalty Act of 1996, One year statute of limitation; Can and individual overcome this limitation, Under the miscarriage of Justice Exception, By showing he was Denied his Constitutional Right to be present at his own trial. Due to the fact, The individual was very sick and hospitalized and the trial continued without his presence. The individual did not Voluntarily absent himself from the trial.

List of Parties to the Proceeding
Pursuant to Rule 14.1 (b)

Pursuant to the Supreme Court Rule 14.1 (b), Petitioner Bruce Randol Merryman certifies that the names of all Parties to this Proceeding appear in the caption of the Petition for Writ of Certiorari.

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Statement of Jurisdiction

This Court has Jurisdiction under 28 U.S.C. § 2254 to review a case, with in the Writ of Certiorari. The United States Court of Appeals, Fifth Circuit and the United States District Court, Both had Jurisdiction under the Writ of habeas corpus 28 U.S.C. § 2254 And the Texas Court of Criminal Appeals had Jurisdiction under 28 U.S.C. § 1254 Writ of Habeas Corpus and so forth.

For Cases from Federal Court.

The date in which the United States Court of Appeals, Fifth Circuit, Ordered Motion for C.O.A. Granted was May-7, 2018 and the Case is "Still Pending". The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

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See = Appendix's Opinions Below

The opinion of the United States Court of Appeals, Fifth Circuit is at Appendix - A, to the petition and is unpublished.

The opinion of the United States District Court appears at Appendix - B and C, to the petition and is unpublished.

The opinion of the Texas Court of Criminal Appeals appears at Appendix - D and F, to the petition and is unpublished.

The opinion of the Trial Court 175th District Court appears at Appendix - E and G, to the petition and is unpublished.

The opinion of the Texas Fourth Court of Appeals appears at Appendix - H, to the petition and is published at Merryman v. State, 391 S.W. 3d 261. (2012)

Constitutional Provisions and Statutes Involved

United States Constitution, Fifth Amendment.

United States Constitution, Sixth Amendment.

United States Constitution, Fourteenth Amendment.

B. E. D. P. A. One year statute of limitation 28 U.S.C.

§ 2254 and 28 U.S.C. § 2244.

Declaratory Judgment Act 28 U.S.C. § 2201 (A)

In a case of actual controversy within its Jurisdiction
--- any court of the United States, upon the filing of
an appropriate pleading may declare the rights and
other legal relations of any interested party seeking
such declaration shall have the force and effect of
a final Judgment or decree and shall be reviewable as
such.

Statement of the Case

Petitioner challenges the Director's custody of him pursuant to the Judgments and Sentences of the 175th District Court of Bexar County, Texas in cause number 2011-CR-0310, Counts one through Six.

Petitioner was charged by indictment with three counts of Misapplication of fiduciary Property and three counts of Theft, to which Petitioner entered pleas of Not Guilty.

A Jury found Petitioner guilty as charged and assessed punishment at sixteen years imprisonment for counts one and two, ten years imprisonment for count three and two years imprisonment for counts four through Six, each count to be served concurrently.

The Fourth Court of Appeals of Texas affirmed the trial courts judgments as modified on November-30, 2012, Merryman V. State, 04-11-00513-CR.

Merryman's Petition for Discretionary review was refused by the Texas Court of Criminal Appeals on April-24, 2013, Merryman V. State, number PD0005-13 (Tex. Crim. App. 2013)

Petitioner filed his first State application for Writ of Habeas Corpus challenging his conviction's on August-20, 2014. The Texas Court of Criminal Appeals Denied the application without written order on

the findings of the trial court without a hearing

on December-10, 2014.

Petitioner filed his second state application for Writ of Habeas Corpus challenging his conviction's on June-15, 2015, which the Texas Court of Criminal Appeals dismissed as a subsequent application on March-22, 2017 on the findings of the trial court without a hearing.

Petitioner filed a Federal application for Writ of Habeas Corpus challenging his conviction's on April-5, 2017

which the United States District Court, Western District of Texas, San Antonio, Division, Barred Petitioner from

Federal Habeas relief, by the (H.E.D.P.A.) one year

statute of limitation set forth in 28 U.S.C. § 2244(d)

cause number. 5A-17-CA-0311-DHE on September-28, 2017

Petitioner filed a Notice of Appeal in the United States

District Court on October-11, 2017

Petitioner filed a Motion for C.O.A. in the United

States Court of Appeals, Fifth Circuit. The Fifth

Circuit Clerk sent Petitioner a letter stating his Motion

for C.O.A. was docketed on October-26, 2017, cause

number. 17-50914

Petitioner's Motion for C.O.A. was Granted on May-7, 2018. Petitioner's Motion for C.O.A. was Granted in

part and Denied in part.

Summary of Argument

Exceptional Circumstances exist that justify the exercise of the Supreme Courts discretionary Powers to Grant Writ of Certiorari.

Petitioner Hopes that this Court consider the importance of the Constitutional Claims at issue here in deciding whether the (A.E.D.P.A.) one years statute of limitation 28 U.S.C. § 2244(d) should not time-bar a 28 U.S.C. § 2254, When an individual's Constitutional Right to be present at their own trial was Denied to them.

Any Individual that was Denied their most Basic Constitutional Right of the accused at trial, Has a Constitutional Right to be heard by the Federal Courts and not be based on the passage of time. Day V, Mc Donough, 126 S.Ct 1687 (Quoting Granberry, 481 U.S. at 136, 107 S.Ct 1671) Determine whether the interest of Justice would be better served by addressing the Merits or by dismissing the Petition as time-barred, We repeatedly asserted that the passage of time alone could not extinguish the Habeas Corpus Rights of a person subject to an unconstitutional incarceration. (Quoting Pennsylvania exrel Herman V. Claudy, 350 U.S. 116, 123, 76 S.Ct 223)

The Fifth and Sixth Amendment Clearly state that

Every one accused of a crime has a Right to a trial by Jury and that the accused in all criminal prosecution's has a Right to be confronted with the witnesses against him and a Right to be present at trial.

State V. Grace — Vt. —, — A.3d — (2016) Right to be present at trial.

Fairy V. Tucker, 132 S. Ct 2218 (2012) An accused's Right to be present at his own trial is among the most Fundamental Right our Constitution Secures, I would Grant a Writ of Certiorari. Id.

The fact of the matter is, the only way to overcome the (A.E.D.P.A.) one year statute of limitation to date, is by showing a gateway claim of actual innocence.

Petitioner is asking the Supreme Court if a person is Denied there Constitutional Right to be present at their own trial and that person did not voluntarily absent them self from the trial, can that person overcome the (A.E.D.P.A.) one year statute of limitation, as a gateway claim.

Petitioner was ordered by the United States District Court to 'Show Cause' (DE4), Cause number SA-17-CF-0311-DAE and Petitioner did file a 'Reply to Show Cause' = See (DE5), which has medical Records to back up Petitioner's Claims.

McQuiggen V. Perkins, 133 S. Ct 1924. The Federal Writ of Habeas Corpus plays a vital role in

Protecting Constitutional Rights (133 S.Ct 1924) The
 Anti-terrorism and Effictive Death Penalty Act of
 1996 (A.E.D.P.A.) 110 Stat. 1214, seems to eliminate delays
 in the federal Habeas process, But the A.E.D.P.A. seems
 to do so without undermining Basic Habeas Corpus principles
 and while seeking to harmonize the new statute with
 prior law. Id.

Petitioner does not believe that when Congress enacted
 the A.E.D.P.A. one year statute of limitation it was
 to deny such Basic Constitutional Rights as the accused's
 right to be present at there own trial.

Petitioner feels that the United States District Court
 does not address the issue in the order to dismiss
 with prejudice as time-barred and the United States
 Court of Appeals, Fifth Circuit, Denied C.O.A. on
 same issue as stated above, And for this reason
 Petitioner is filing his writ of Certiorari; See Appendix's
 = A, B, and C.

Until the Supreme Court address this issue, the lower
 Courts will not use an accused's right to be present at
 their own trial, as a gateway claim to overcome the
 A.E.D.P.A. one year statute of limitation.

Petitioner would Hold that he is entitled to relief
 pursuant to 28 U.S.C. § 2254, Writ of Habeas Corpus
 under the 28 U.S.C. § 2244 (d).
 I am sorry for my spelling and writing, I have dyslexia
 and it does not help me in my legal writing.

As to Petitioner's Claims of Being Denied his Right to be present at his own trial, under the Fifth, Sixth and Fourteenth Amendment.

On June-16, 2011 = During the trial and after a lunch break the following colloquy occurred outside the presence of the Jury, Per the transcripts: The Court = I'm going to call back to order cause number 2011-LR-0310. It's now 2:15 in the afternoon, At 12:00 o'clock we took our lunch break, and Mr. Bruce Randol Merryman, the defendant in this case, was present at that time. He was also present at the beginning of the trial, and he's been present during the entire trial until now. But at the time we broke at 12:00 o'clock to go to lunch, I told everybody to be back in this courtroom at 1:30, It's now 2:15 in the afternoon and Mr. Merryman has not appeared. His attorney is here, the State is here, the states prosecutors are here, every body is here including the jury, and they have been here since 1:30.

So I'm going to find that under Article 33.03 that this matter proceed on to it's conclusion. I will recognize Mr. Eastland [defense counsel] for any thing that you want to put on the record at this time.

Mr. Eastland = Yes, Your Honor, At this time, because my client is not present and we do not know whether or not it was voluntary or not, I do know he has a history of medical health issues, and were asking at this time — Were asking for a mistrial.

The Court = And I respectfully overrule that mistrial.

I don't have any reason to believe that Mr. Merryman has done anything except voluntarily absent himself. There was nothing brought to the court's attention. And I know you Mr. Eastland, have been trying to reach him and you have left telephone messages with both his wife and —.

Mr. Eastland = His parents as well.

The Court = — his parents, and can't get any response from anybody, and it appears quite clear to me that this is probably a deliberate action on Mr. Merryman's part. So I'm going to overrule your motion.

Now, I do want to tell you that we have to proceed carefully at this point, I think that what we have to do is go on about the process of trying this case. There is simply going to be an absent seat there. I regard this to be a little bit like commenting on failure to testify. You can't point out over there and say he didn't care enough about his own case to be back, you know, I know that the jury is going to be wondering that question, where is he, but I think it would be better if we not mention this. We just go on from here and try to conclude this case. Okay?

Mr. Eastland = In addition, Your Honor, were asking for an oral motion for continuance to come back when we find Mr. Merryman.

The Court = I'm going to overrule that motion then.

The trial continued without Petitioner Presence

Concluding in his Conviction the following day on all counts, (RR4=87-88; RR5=4-5). Petitioner was sentenced on June-24, 2011, (RR6=3-4) after being picked up by two officers and been discharged from the hospital on June-21, 2011.

Petitioner's Attorney Britt Eastland never mentioned to the trial court prior to sentencing that Merryman had been hospitalized, nor were hospital records introduced.

Under, Texas code of Criminal Procedure, Article 33.03 it states, In all prosecutions for felonies the defendant must be personally present at all stages of the trial, unless the defendant voluntarily absents him self from the trial.

Under, the Constitution, A person not present at their own trial is a violation and can constitute Harmed Constitutional Error.

In the United States District Court, Cause no. SA-17-LA-0311-DÆE; See Petitioner's "Reply to show cause (DE5)" In Exhibit=A, is an affidavit from my trial attorney Britt Eastland, Dated Oct-20, 2014.

The trial court, 175th District Court, Bexar County, TX. Which ordered Mr. Eastland to file said affidavit, in response to Petitioners Claims of Ineffective Assistance of Counsel and Denied my right to be present at trial.

Mr. Eastlands Affidavit states: It is surprising that he is just now complaining in his writ that he did not get a chance to tell his side of the story,

When in fact, it was his fault that this happen, because in the middle of the trial he left the courtroom house and drove out of town never to return for the remainder of the trial, Again, it is my understanding that he was never hospitalized like he now claims and he has never provided any valid documentation from the hospital to back this claim up.

Yes, at that time Petitioner did not have any hospital records, But Mr. Eastland now I was in the hospital, Because I told him I was, but because I did not know what hospital I was in at that time and my wife Karen Merryman trying her best, just could not find what hospital I was in. But the fact of the matter is Mr. Eastland and the 175th District Court knew Petitioner was in the hospital, Because two officers, with an arrest warrant, picked me up from the hospital, On June-21, 2011 and was not sentenced until June-24, 2011. And the truth is the 175th District Court backed up Mr. Eastlands affidavit. See - Appendix - G, trial courts opinion, first state writ filed, by Petitioner.

Petitioner did file a second state writ of habeas corpus and thanks to the "conviction integrity unit" out of Bexar County. Petitioner was appointed an Attorney Julie B. Pollock. M.S. Pollock sent Bruce Merryman documents to sign "Authorization to disclose protected health information, Texas health and safety code § 181.001."

And ms. Pollock was able to find what hospital Petitioner was in. After my wife Karen Merryman recieved documents signed by Bruce Merryman, along with what hospital I was in, Karen was finally able to recieve hospital records from North Austin Medical Center. Karen made copsy of said records and sent me one copy so I could read them for myself. Petitioner then sent that copy on to ms. Pollock and she filed two motions. One on April-12, 2016 and one on Aug-23, 2016 and with said motion's there was a copy of the "St. Davids North Austin Medical Center Hospital Records" sent to the 175th District Court. But the two motion's were Denied by the trial court and and Petitioner was never even given a hearing in the State Courts ever. See Appendix's = D, E, F, and G.

Bruce Merryman's Hospital Records State: 46 year old male was found lying under a tree by the side of I35, His car was abandond at side of the road and was being towed. He was found unresponsive. He cannot recall events from the last two days. Patient's wife is in San Antonio and was called and states that he has been gone for two days. The Patient was addmitted to I.C.U., History limited by Altered Mental Status. Patient has Acute Renal Failure with a Creatine of 10.7, Oxygen Saturation is low, Altered Mnuation with low blood pressure 85/40 and a Pulse of 120. Patient appears to be well nourised. He still thinks he is in San Antonio, But he states that they told him, he is in Austin, so he is a little Confused by this, Changed Mental Status and

Confusion. It was gradual in onset. He has been disoriented and confused and is described as having decreased responsiveness. Patient is disoriented to person, place, time and situation.

There is over 100 pages of Hospital Records from the North Austin Medical Center. During Bruce Merryman's trial, I lived at I 35 and O'Connor rd in North North San Antonio, Texas. Petitioner must of started to go home for lunch break that day and lost my way and ended up in Austin and the medical records back up my claims and for this reason Petitioner is filing this writ of Certiorari.

My wife Karen and I could not find what hospital I was in. What did not help matters was my family and I just moved from Michigan in 2007 to Texas. And we really did not know Texas that well. When Petitioner was picked up by the two Officers, with an arrest warrant, I was not in my right state of mind, so I did not see what the name of the hospital was. But the fact is the arrest warrant and the hospital records match the same day I was picked up. Each record is stamped June-21, 2011. So how could the trial court, 175th District Court, not know I was in the hospital, when they issued the arrest warrant. I do believe the courts knew I was in that hospital and on June-24, 2011 a new trial should have been ordered. Again, Bruce Merryman was picked up by two officers on June-21, 2011 and was sentenced to 16 years in prison on June-24, 2011. (RR6-3-4)

Petitioner was just picked up from the hospital and was never given the chance to recover from a "Mental and Physical trauma" and I believe, because two officers with an arrest warrant, showed up at the hospital, I was prematurely discharged from the hospital.

Bruce Merryman was not in his right state of mind during the short amount of time, he was at trial and don't even remember really any of the trial, that I was there for, and the hospital records back up this claim.

Petitioner will state, there was no reason why the 175th District Court, could have stoped the trial in an effort to try and find me. Again, when my trial attorney just told the trial court, Bruce Merryman had a history of medical health issues and we do not know whether or not it was voluntary or not, And did go on to ask for a mistrial and a continuance to come back when we find Mr. Merryman. I could have very well died under that tree.

Morre V. State, 670 S.W. 2d 259. The Court of Appeals reversed appellants conviction, Holding that the trial court abused it's discretion by proceeding (670.S.W.2d 261) with the trial since there was nothing in the record to show at the time the court ruled that morres absence was voluntary.

Because Merryman was not at his own trial "mentaly or Physically" he was not able to defend himself or to persent any evidence on his own behalf.

United States v. Gragnon, 105 S.Ct 1482. The Constitutional Right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment. eg.

Illinois v. Allen, 90 S.Ct 1057. The ninth circuit court of appeals "Reversed the conviction" It violated respondents Right under Rule-43 and the Due process Clause of the fifth Amendment (721 F.2d 672)

In Petitioners Reply to show cause order (DES) cause no. SA-17-CR-0311-DAE, United States District Court. There is over 40 documents and or evidence that was not presented at trial in no way shape or form. Because the documents have to be physically available at the time of the trial and disclosed to the Jury, Judge and prosecuting attorney, for my defence. Which my own trial attorney did not do, in my absent.

If I was present at trial "Mentally or Physically" I could have defend myself, given testimony on my own behalf and tried to present documents my own trial attorney did not present, which showed Bruce Berryman did not commit any crime; see (DES).

This is why, it is so important that Petitioner was present at my own trial and there is a reason why the Fifth, Sixth and fourteenth Amendment of the Constitution. are put in place.

Also in Petitioners Reply (DES) are a lot of medical records to back up my claims. See Exhibits - "I and H" in (DES)

It will show not only was Petitioner sick during trial, but also show I was sick way before trial ever started. His my trial attorney stated, Bruce has a history of medical health issues.

Petitioner was going to the Start Center for cancer care for my health issues. My trial was in June-2011 and

documents from the Start Center for cancer care show from Nov-11, 2009 to April-5, 2011. Just two months before my trial took place. April-5, 2011 = Records State & Mr. Merryman appears to have gradually dropped into a

iron deficiency state, yet again, from gastrointestinal blood loss. He has evidence of Profound iron deficiency with a hemoglobin of 7.7gm. I have advised him to receive two units of packed red cells as an immediate means of improving his hemoglobin and hematocrit at the Methodist Hospital. "There after, I will initiate the program of parenteral iron supple mentation for Mr. Merryman. We briefly talked about the fact that

Profound Enemic states such as the one he presents with today (April-5, 2011) can result in profound cardiac stress resulting in cardiomyopathy.

Also there are H.E.B. Reports of weds Petitioner was on from June-1, 2010 to June, 2011. The Report States: Bruce Merryman was on 30mg of morphine - 2, times a day; 10-325 mg Hydroco - 3, times a day; 10 mg of tramoni HCL - 8, times an-day and alot more.

Petitioner has back and heart problems along with iron deficiency problems. All these medical health issues

were two plus years before my trial ever took place and I was very sick before and during my trial. The medical records back up this claim, not just my words, But true facts.

Again, It all goes back to the fact that the trial court should not have proceeded without me present to defend myself and there was no prove during the lunch break that day, That Bruce Merryman did voluntary absent himself from the trial.

The courts should have put an effort in trying to find Mr. Merryman, not just proceed without me present. The fact of the matter is, The Texas Trial Court in my case did not care about Mr. Merryman being at his own trial, they only cared about the conviction.

Petitioner is asking the Supreme Court to Grant his writ of Certiorari and allowe him to overcome the F.E.D.P.A. One year statute of limitation, because he was Denied his Constitutional right to be present at his own trial.

Rule-11, of the Supreme Court; A petition for a writ of certiorari to review a case pending in a United States Court of Appeals, before judgment is entered in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court. See 28 U.S.C. § 2101(c)

Petitioner is asking the Supreme Court in the instance

of the Court deciding to await a decision from the United States Court of Appeals, Fifth Circuit, Concerning the motion for C.O.R. was Granted, Hold this argument in abeyance and or stay, untill after a judgment has been written by the United States Court of Appeals, Fifth Circuit. See - Appindex = A.

Reason's for Granting the Writ

I

The question presented is one of extraordinary national importance that the lower courts have failed to analyze the importants of the right, of the accused at trial.

II

The lower courts dicision conflicts with the Fifth, and Sixth Amedment of the U.S. Constitution, which is not the reason why the A.E.D.P.A. One year statute of limitation was inacted by congress. It was inacted to seek eliminate delays in the federal habeas review process, not to ~~the~~ take the rights away from the accused at trial. The Supreme Court has repeatedly recognized to the public, that a person has a right to be present at all stages of the trial process, which ~~not~~ conflicts with denying a person's Constitutional right with in a Writ of Habeas Corpus.

III

Just because the accused are indicted, does not mean they are guilty of these charges and if the trial courts are allowed to convict some one while they are not present, the accused loses their right to defend themselves. Of a crime they may have or may not have committed. The fact that the lower courts have denied that person through the court appeal process, knowing the person was not present to defend themselves and then the Federal courts under the 2254 writ of habeas corpus, dismiss the case because of the A.E.D.P.A. one year statute of limitation, denies the accused their rights at trial.

IV

If the accused, for example myself, was not at trial "Mentally or Physically" because of being very sick and was hospitalized, the trial attorney representing the accused can willfully not disclose documents and or evidence or put up a true defense and act on his own accord and the trial ends up running amuck, this person should be allowed a gateway claim of being denied his constitutional right to presence, during his or her trial and the A.E.D.P.A. one year statute of limitation should not hinder the merits of the claim, if that person did not voluntarily absent themselves from the trial. Had for these reasons, the Petitioner is asking the Supreme Courts to Grant Writ of Certiorari.

Conclusion

Petitioner is asking the Supreme Court to Grant writ of Certiorari and set aside his Conviction's. No Court system should be allowed to deny the Constitutional Rights of the accused. Petitioner argues that the F.E.D.P.A. one years statute of limitation should not hinder his or her Constitutional Right under the 28 U.S.C. § 2254 Writ of Habeas Corpus and allow a gateway claim to be heard by the Federal Courts and not be time-barred. The Texas Courts new Petitioner was in the hospital and failed to provide Bruce Merryman his due process right to a fair trial, in a fair tribunal, Per the Fifth, Sixth and Fourteenth Amendment under the Constitution. This was a miscarriage of Justice and Petitioner should be allowed to overcome the One Year statute of limitation under 28 U.S.C. § 2244. Petitioner respectfully ask the Supreme Court for a ruling to Question Presented.

Signed and Dated

9-19, 2018

Resubmitted with
Correction made

September-19, 2018

Respectfully Submitted

Bruce R Merryman

Bruce Merryman
T.D.C.J. no. 1730381
McConnell Unit
3001 S. Emily Dr
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I Bruce Merryman declare or Certify, verify or state under penalty of perjury that the foregoing is true and correct. Executed on September-19, 2018
28 U.S.C. § 1746 unsworn declaration

Certificate of Service

This will certify that a true and correct copy of the above and foregoing writ of Certiorari has this day been forward to Jennifer Wessinger, Assistant Attorney General P.O. Box 12548, Capitol station, Austin, Texas 78711, Respondents Attorney for Lorie Davis Director of T.O.C.J. and was placed in the internal mail system at McCoull Unit and that all postage was prepaid on this day 19th of September, 2018