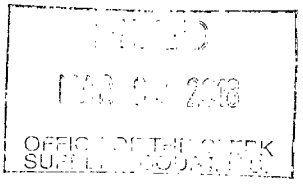
18-7610

IN THE
SUPREME COURT OF THE UNITED STATES
_____2018
No._____



MICHAEL COLBAUGH,

Petitioner,

-against-

LORIE DAVIS, DIRECTOR

TEXAS DEPARTMENT OF CRIMINAL JUSTICE,

CORRECTIONAL INSTITUTIONS DIVISION

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MICHAEL COLBAUGH
TDCJ-ID # 688832
RT. 2 BOX 4400
GATESVILLE , TEXAS
76597

PETITIONER

PARTIES

The Petitioner is Michael Colbaugh, a state prisoner at the Alfred Hughes prison unit in the Texas Department of Criminal Justice - Correctional Institutions Division (TDCJ), Texas. The Respondent is Lorie Davis, Director of the TDCJ.

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QUESTIONS PRESENTED

1. Whether the Texas Court of Criminal Appeals ruling, denying Petitioner a second Writ of Habeas Corpus pursuant to the Texas Code of Criminal Procedure Article 11.07 §4 (a)-(c), is in error, when Petitioner had no legal counsel on his first state writ of habeas Corpus, Petitioner raises a substantial claim of the inneffective assistance of counsel on his second state writ regarding the performance oh his trial counsel, petitioner seeks to apply the equitable exception to his procedural default in state court that is outlined in the Supreme Court's holding in TREVINO V. THALER 133 S. CT. 1911(2013).

2. WHETHER THE UNITED STATES DISTRICT COURT for the Northern Distrcit of Texas erred in dismissing Petitioner's first federal writ of habeas corpus, ~~wiy~~-finding the writ was time barred in direct contravention to the Supreme Court's Holding in TREVINO V. THALER 133 S,CT, 1911(2013) , which provided that proceduraly defaulted claims of ineffective assistance of counsel may proceed on a first federal petition if there was no counsel in the initial review collateral proceeding, or counsel in that proceeding was inneffective.

QUESTIONS PRESENTED CONTINUED

3..Whether a guilty plea is involuntary/unknowing/uninteligently made when the prosecution fails to disclose exculpatory evidence to the defense that the defendent did not commit the charged offense, & the defendent, had that evidence been made known to him,would have chosen to go to trial insted of pleading guilty based upon the evidence's direct corroboration that the charged offense was committed by someone else than the defendent.

4.Whether a defense attornet in a capital murder case renders the effective assistance of counsel to a client pleading guilty, when the prosecution withholds exculpatory evidence from the defense, the defense attorney does not discover the evidence in his own investigation, the attorney does not advise the defendent of the exculpatory evidence & the defendent, as a result of his attorneys' lack of investigation & advise loses the ability to present the evidence in support of his defense that the murder the defendent is pleading guilty to was actualy committed by someone else.

5. Whether the witness testimony of Jaime Gratzinger, Christopher Jones, Jeffrey Offutt , Michael Colbaugh & Dr. Marc Krouse (which is contained in the trial records of case No. 0492753- The State of Texas v. Johnny Snodgrass- & the trial records of case No. 0493756- The State of Texas v. Jackie Templer-) as well as the judicial finding of facts made in the appealate record(of case No. 2-94-436-CR- JOhnny Snodgrass v. The State of Texas) by the Honorable Justice Sam Day, show that Petitioner did not in fact commit the conduct that serves as the basis of his murder conviction, such that petitioner is actually innocent of the elements of his charged offense of conviction.

6. Whether the State of Texas has erred by affirming petitioner's conviction for 1st degree murder, on a charge that was not submitted to a jury in direct contravention to the Supreme Court's Holdings in DUNN V. UNITED STATES 99 S.CT. 2190(1979) & McCORMICK V. UNITED STATES 111 S.CT. 1807(1991) STATING THAT appealate courts are not free to revise the basis on which a defendent is convicted.

7. Whether the U.S.Distriuct Court erred by affirming petitioner's conviction for 1st degree murder, on a charge not submitted to a jury, in direct contravention to the Supreme Court's holdins in DUNN, McCORMICK.

8. Whether fraud was perpetrated upon the court when the prosecutor allows to pass into the court record, a Pre-Sentence Investigation Report which states as its factual basis for pleading to the current offense, facts that are untrue.

TABLE OF AUTHORITIES

COURT RECORDS RELIED UPON

State of Texas v. Michael Colbaugh, case No. 0492754
INDICTMENT, JUDGEMENT, PRE-SENTENCE INVESTIGATION REPORT
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STATE OF TEXAS V. JOHNNY SNODGRASS, CASE nO, 0492753, TRIAL RECORD
JOHNNY SNODGRASS V. STATE OF TEXAS, APPELLATE RECORD, CASE No. 2-94-436-CR
STATE OF TEXAS V. JACKIE TEMPLER, CASE No..0493756, TRIAL RECORD.

STATUTE

28 U.S.C. § 2254(e)(1)
TEXAS CODE OF CRIMINAL PROCEDURE ARTICLE 11.07(a)-(c)

DECISIONS BELOW

The decision of the United States Court of Appeals for the fifth Circuit denying a certificate of appealability is believed to be unreported. It is attached in appendix A to this petition as (A1). The decision of the United States District Court for the Northern Division OF Texas denying Petitioner's first federal Writ of Habeas Corpus is believed to be unreported. It is attached hereto as (A3). Petitioner sought state habeas relief from his conviction by filing two state habeas applications. The first writ ~~(No. WR-40~~ (No. WR-40,052-01) attacked the legality of an affirmative finding that the Petitioner himself used or exhibited a deadly weapon in the commission of the instant offense when the Petitioner was under the mistaken belief that he had been convicted under the "Law of Parties". The first state writ was denied without a written order January 27th, 1999. The second state writ (No. WR-40,052-02) was filed July 17th,2015. This writ attacked the instant offense under the following grounds: 1. Factual innocence, 2. Involuntary/ Unknowing/Unintelligent plea based upon the prosecution with holding exculpatory evidence, 3. Inneffective assistance of counsel due to the prosecution with holding exculpatory evidence from petitioner's defense counsel. 4. Inneffective assisatnce of counsel due to petitioner's counsel failing to discover, disclose & advise petitioner of the excupatory evidence with held by the prosecution, which petitioner had asserted he would use at trial (rather than plaed guilty) to refute the elements of his offense had he known of the existance of such evidence,5. Constructive denial of counsel through the prosecution's failure to disclose exculpatory evidence, 6. Fraud perpetrated upon the court by the prosecution passing into the court record a Pre-Sentence Investigation Report at petitioner's sentencing which contained a factual basis for petitioner's conviction known to be untrue.

Petitioner's second state habeas writ was recomended for dismissal as a subsequent application pursuant to article 11.07, § 4 of the Texas Code of Criminal Procedure by the trial court on August 18th, 2015. A copy is attached hereto as (A17). The Texas Court of Criminal Appeals dismissed petitioner's second state habeas writ on September 23, 2015 as a subsequent application for a writ of habeas corpus pursuant to the Texas Code of Crikimal Procedure, article 11.07, Sec. 4(a)-(c). A copy is attached hereto as (A16). Petitioner did not have legal representation in the filing of either of the two state habeas writs. Petitioner filed his first federal writ of habeas corpus on or about February 8th, 2016, case No. 4:16-CV_664, also without the aid of legal representation. Petioner raised ~~the same~~ the same constitutional violations in his federal writ that he had first given the State of Texas an opportunity to address in his second state writ, I.E. : Actual innocence, Involuntary unknowing, unintelligent plea, constructive denial of counsel, inneffective assistance of counsel & fraud upon the court. The Honorable Judge John McBryde, did enter an opinion & order denying this federal writ on February 10th, 2017. A copy is attached hereto as (A3). The petition was dismissed as being time barred under Title 28 U.S.C. § 2244 (d). Before the entry of the order dismissing petitioner's federal writ, the State of Texas was ordered to respond to Petitioner's fedral writ alleging violations of the United States Constitution, and the State did file an answer in response. Acopy is attached hereto as (A18). Petitionewr filed a response in opposition to the State's answer to Petitioner's federal writ. A copy is attached hereto as (A33).

JURISDICTION

The judgement for the United States Court of Appeals for the Fifth Circuit was entered on December 8, 2017. Petitioner did not receive the judgement until

Decemeber the 15th, 2017. Jurisdiction is conferred by 28 U.S.C.1254(1). jURISDICTION IS ALSO CONFERRED BY THE sUPREME cOURT'S ABILITY TO REVIEW the decisions of the highest court of the State of Texas, under 28 U.S.C. 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Amendments 5, 6, & 14 to the UNITED STATES CONSTITUTION.

STATEMENT OF THE CASE

In November of 1992 Petitioner was charged by indictment with capital murder by intentionally causing the death of Roger Rushing by shooting him with a firearm, while in the course of committing & attempting to commit robbery & kidnapping of Roger Rushing. The offense was alleged to have happened on the 13th day of September,1992, when the Petitioner was 17 years old. Petitioner was arrested October 20th,1992. After 19 months of incarceration Colbaugh was offered a plea agreement to the lessor included offense of first degree murder. On July 29th,1994 Colbaugh plead guilty to murdering Rushing by shooting him personally with a pistol. The State used only this in court statement to support the plea. On November 3rd,1994 the State offered a Pre-Sentence Investigation Report to the trial court, with the factual basis of the following information; (listed under Section) IV. Current Offense:...Capital Murder/9-13-92/TCSO/:in the course of committing robbery D shot the victim with his handgun. (Redused to Murder). Weapon Used: Yes...If Yes,type: handgun. A copy of this report is attached hereto as (A42). On November 3rd,1994 the trial court sentenced Colbaugh to life imprisonment for murder, with an affirmative finding that Colbaugh used a deadly weapon in the commisssion of the offense. A copy of the judgement is attached hereto as (A46).

Between July 29th,1994 & November 3rd,1994, the State of Texas conducted two additional trials for capital murder, for Johnny Snodgrass & Jackie Templer, whowho were charged by indictment for causing the death of Roger Rushing by shoot-

ing with a fire-arm...In these two trials (State of Texas v. Johnny Snodgrass, Case No. 0492753, & State of Texas v. Jackie Templer, Case No. 0493756) the state brought forth five witnesses whose testimony refutes that Colbaugh shot Rushing as Colbaugh was charged with doing. In addition it is revealed that Rushing was instead shot by Snodgrass & Templer after Colbaugh walked away from Rushing, Snodgrass & Templer. Snodgrass is then revealeed to have shot Rushing with a .45 caliber pistol 5 times, while templer is revealed to have shot Rushing 3 times with a shotgun.

A judicial finding of facts was compiled in the appeal of Snodgrass (for the capital murder of Rushing). A copy is attached hereto as (A48). These facts state that the murder of Rushing ocurred after Colbaugh walked back to his car. These facts state that Colbaugh left Rushing with Snodgrass & Templerr... The facts marshalled in the appeallate opinion of Johnny Snodgrass v. the State of Texas, in the Second District Court of Appeals of Texas, Fort Worth, Case No. 2-94-436-CR, was compiled by a three judge panel of Justices: Day, Brigham, & Holman,JJ. , with Justice Sam DAy signing the opinion, (A59).

Snodgrass & Templer were both convicted of the capitsal murder of Rushing. Another defendent, Jeffrey Offutt, was also indicted for capital murder of Rushing but reached a plea agreement with the state, plead guilty to robbery(with the affirmative finding of a deadly weapon) & was sentenced to 30 years in TDCJ_ID.

Between the date Colbaugh plead guilty (07/29/1994) & the date Colbaugh was sentenced (11/03/1994) phyusical & tesimonial evidence was discovered in the trials of Snodgrass & Templer which exculpated Colbaugh as the shooter of Rushing. The names of these witnesses & the existance of this evidence was not provided to Colbaugh before he entered a plea, or before he was sentenced to life imprisonment, despite the affirmative duty of a prosecutor to disclose such information. COlbaugh had to discover this information

by doing his own investigation, with out the help of legal representation.

Colbaugh filed a first State Habeas writ, No. WR-40,052-01 in December of 1998, without legal representation. It was denied without written order January 27, 1999, by the Texas Court of Criminal Appeals. Colbaugh Filed A second State Habeas Writ, No. WR-40,052-02, on July 15, 2015, also without the help of legal representation. The State responded to the application of a writ of habeas corpus, it adopted as fact that the Petitioner did not, personally fire the gun...but that does not exonerate him. ([redacted]) A91

Colbaugh filed a traverse response to the State's Response, arguing an exception to the State's proposed bar of a subsequent writ. A copy is attached hereto as ([redacted]) A60. When the trial court made a reccomendation of dissmissal to the Texas Court of Criminal Appeals, Petitioner filed a motion for reconsideration of the trial court's order recommending dismissal. A copy is attached hereto as ([redacted]) A72. The TX.CT.C.A. denied Colbaugh's second state writ without a written order, as a subsequent writ, stating that the Texas Code of Criminal Procedure Article 11.07 § 4 (a)-(c) justified their decision to deny the writ, ([redacted]). A16.

Colbaugh then filed a first federal Writ of Habeas Corpus: Case No. 4:16-cv-664, in the Northern District of Texas. The State was ordered to answer the writ, & the State did answer the writ, by filinf a motion to dismiss with brief in support. The Respondent argued that Petitioner was time barred by the AEDPA 1 year statute of limitations, the Respondent argued that Petitioner

had technically exhautsed al of his claims by first presenting them to the state court in his second state habeas writ, but that he was procedurally barred ffrom the federal forum. The state argued that an adequate & independent state ground (abuse of the writ) was sufficient to deny Petitioner federal relief of habeas corpus. Colbaugh filed a response in opposition to respondent Davis' motion to dismiss arguing for a cause & predjudice exception to the procedural default argued by the state. Colbaugh also raised a miscarriage of justice exception to the procedural default argued by the state. A copy is attached hereto as (A 33).

The District Court Judge, John McBryde, denied Petitioner's federal writ of habeas corpus on February 10, 2017. Petitioner filed a timely notice of appeal. Petitioner filed a request for a certificate of appealability, attached hereto as (A 75). Petitioner filed a reguets to procede inForma Pauperis. Petitioner filed his request for ~~C?~~ C.O.A. & In Forma Pauperis request with the UNITED STATES DISTRICT COURT OF APPEALS FOR THE FIFTH CIRCUIT on March 10, 2017. It was assigned Case No. 17-10305 by the fifth circuit.

On December 8, 2017 the fifth Circuit entered an order denying Petitioner's request for C.O.A. , as well as his In Forma Pauperis request, (A1). Petitioner did not recieeve this notice until December 15, 2017, when he received a notice to come by the mailroom. The Fifth Circuit ruled Petitioner's claims were not debatea ble by jurist of reason, nor did they raise the denial of a Constitutional right.

Petitioner filed this Writ of Certiorari with the United States Supreme Court, also without the aid of legal representation, after determining that jurist of reason(the Supreme Court) had resolved the issues differently.

BASIS FOR FEDERAL JURISDICTION

This case raises a question of the interpretation of Due Process, Fair Trial & the Effective Assistance of Counsel, guaranteed by the 5th, 6th, & 14th Amendments to the United States Constitution. The District Court had jurisdiction under the general federal question jurisdiction conferred by 28 U.S.C. 1331.

REASONS FOR GRANTING THE WRIT

The holding of the Texas Court of Criminal Appeals(TCCCA) holding that Colbaugh does not meet the cause & prejudice exception to the defense of a subsequent writ bar is in direct contravention to the United States Supreme Court Ruling in Trevino V. THALER, 133 S.CT. 1911(2013) & McQUIGGEN V. PERKINS, 133 S.CT. 1924(2013). In TREVINO the Supreme Court held that no counsel, or inneffective assistance of counsel in a Petitioner's initial state level collateral review was cause to excuse a procedural default. In TREVINO the Supreme Court made the ruling in MARTINEZ V. RYAN, 132 SCT. 1309 (2012), explicitly applicable to cases in Texas, because the structure & design of the Texas sysytem, in acxtuak operation, makes it virtually impossible for an ineffective assistance claim to be presented on direct review. Colbaugh complained to the State court that his trial counsel was constitutionaly deficient, that he was constructively denied advice of counsel through the concealment of exculpatory evide4nce & that he had no counsel on collateral review, See Traverse (A63). Colbaugh complained that trial counsels failure to discover & adivise his client of the exculpatory evidence, resulted in Colbaugh losing the abiltiy to present a defense that the murder of Rushing was committed by Snodgrass & Templer, not Colbaugh. Colbaugh also complained that trial counsels failure to discover & advise him of the exculpatory evidence prevented Colbaugh from asserting that the murder was the result of the independent impulse of Snodgrass & Templer & supporting

this defense with corroborating evidence that Snodgrass & Templer had each confessed to two nonaccomplice witnesses that they had in fact shot Rushing to death. Thus Colbaugh lost two defense to the charge of capital murder when Colbaugh's trial counsel failed to investigate & therafter advise Colbaugh of these defense. Had Colbaugh known of the existance of evidence (the testimony of Jaime Gratzinger, Christopher Jones, & Jeffrey Offut) that excluded him as the shooter in Rushing's death, & corroborated an unrealised defense position, Colbaugh avers he would not have plead guilty to personALLY SHOOTING Rushing with a firearm, causing his death as alleged; Colbaugh avers that he would have chosen to go to trial where this evidence could be put forth to show what the Second Court of Appeals for the Stae of Texas has determined to be facts: Colbaugh did not shoot Rushing, Colbaugh left Rushing with Snodgrass & Templer & Began walking back towards the car. Rushing was shot 5 times with... the pistol...& 3 times with the shotgun. In addition Colbaugh would have used Offutt's testimony that Colbaugh did not have a gun (the night of the murder), Offutt's testimony that he did not believe the complainant would be shot (only beaten up), Jones' testimony that Snodgrass & Templer had each confessed to him to have shot the complainant, & Colbaugh's testimony that he had walked away from Rushing, Templer, & Snodgrass, after Snodgrass repeatedly said he would let the complainant go, to show a jury that Colbaugh did not shoot Rushing & Colbaugh did not act with intent to cause Rushing's death; that Rushing's death was the result of the independent impulses of Snodgrass & Templer.

In the State's answeer to Petitioner's second state writ, the state did not adress Petitioner's I.A.C. , fraud or involuntary plea claims. Petitioner woud ask the Supreme Court to determine if in fact the exception to procedural default outlined in TREVINO V. THALER, 133 S.CT. 1911, would warrant a reversal of the TX.C.C.A. decision to deny Petitioner's second state writ of habeas corpus.

Additionally, Petitioner believes the exception to a procedural default (allowing a federal Distict court to hear an ineffective assistance of counsel claim on a Petitioner's first federal writ,when, as here, there was no counsel on a Petitoner's initial collateral review in the state proceeding) would neccessarily cause a federal District Court to follow the Supreme Court's Ruling in MARTINEZ & TREVINO. In Petioner's federal writ it appears that the U.S. District Court found that the Petitioner made a knowing-voluntary Plea (by the Honorable John McBryde's opinion(pg 8)of the District Court's Opinion & order stating " Petitioner waived his claims...) Petitioner would ask this Court to determine whether the District Court has erred in finding that the Petitioner made a voluntary plea in light of Petitioner's I.A.C. claims & the Supreme Court's holdings inSTRICKLAND V. WASHINGTON 466 U.S.668(1984), UNITED STATES V. CRONIC 466 U.S. 648(1984) & HILL V. LOCKHART, 474 U.S. 52. The Supreme Court has determined that a defndent has the right to the assistance of counsel, that this right means the effective assistance of counsel, & that inneffective assistance of counsel applies to the plea process / guilty pleas. Petitioner has asserted inhis first federal writ an I.A.C. claim that the consel he was provided by the state was constructively denied the ability to counsel his client(petitioner), when the state withheld exculpatory evidence that the murder petitioner is charged (& convicted) of committing, was actually commited by Snodgrass & Templer. Petitioner's counsel was placed in a position where he was less likely to be able to afford petitioner the effective assistance of counsel, concerning how the (withheld) evidence would support petitioner's defense that the murder was committed by Snodgrass &Templer as the result of their independent impulse to slay the complainant, when the State withheld this exculpatory evidence. As a result of defense counsel's failure to uncover this exculpatory evidence, Petitioner, who had

now been incarcerated for almost 20 months, since the age of 18 years old, with no previous experience with the law, was left to believe (by his attorney) that there was no evidence which would support the defense that Petitioner did not shoot the deceased, nor did Petitioner intend to cause the complainant's death. Petitioner's counsel did not advise him of the only viable evidence which would show a jury that Petitioner did not commit the conduct that he was charged with having committed. Had Petitoner's counsel advised him that there was evidence that the Petitioner did not in fact shoot Rushing, Petitioner would not have agreed to plead guilty to personaly shooting Rushing, instead Petitioner would have insisted on going to trial where this evidence could be put forth on behalf of the Petitioner's defense that he did not commit the murder, nor did he intend for it to be committed. Petitioner avers that the testimonial evidence of J. Gratzinger, C. Jones, J. Offutt,Dr. M. Krouse, & M. Colbaugh raises a sufficient probability of a different result,were this evidence to be put in front of a jury. Petitioner also avers that the result of the plea would have more likely than not, resulted in a different outcome had this aforementioned witness testimony been disclosed to petitioner in time for him to utilise it to refute the elements of his charged offense (that Colbaugh...intentionaly caused the death of Roger Rushing, by shooting him with a firearm...). A fact finder hearing this evidence may have had a reasonable doubt that Petitioner intentionaly & knowingly caused the death of Roger Rushing & could have chosen to find (as the second appealate court of Texas found) that Colbaugh left Rushing with Snodgrass & Templer, ...and began walking back to the car, thus providing a basis for the trial court to perhaps find Colbaugh guilty of robbery, & sentence him to 30 years instead of life, the same way it did for J. Offutt.

Petitioner avers that it is error to uphold his conviction for murder, under a charge of "the law of parties", when the charge of "the law of parties"

was passed upon by the State of Texas when it deliberately chose to convict the Petitioner of actualy causing Rushing's death by shooting him with a firearm & thereafter entering into the court record a Pre-Sentence Investigation report which also states that...during the course of robbery D (defendent) shot the victim with his handgun.

Petitioner believes that the Supreme Court's holdings in DUNN V. UNITED STATES, 99 S,.CT. 2190(1979), McCORMICK V. UNITED STATES 111 S.CT. 1807(1991), & COLE V. ARKANSAS 333 U.S. 196, 68 S.CT. 514 advise against just such a result as affirming petitioners conviction on/under, a charge/theory not submitted to a jury. To do so would deprive the petitioner of notice of the true nature of the charge as contemplated by the Supreme Court in Henderson V. MORGAN, 96 S.CT. 2253(1976) & SMITH V. O'GRADY 61 S.CT.572(1941), AS WELL AS DEPRIVE petitioner of defending himself against a charge that was not made.

In Texas, "the law of parties" requires proof of facts that an offense was committed by someone else & that the accomplice "party" acted with intent to promote or assist the charged offense BEIR V. STATE, 687 S.W.2d 2(TXCCRA 1985). In this case, petitioner plead guilty to committing the offense, not as a party to the offense, but as if he had actually committed the murder of Rushing. Petitioner did so plead , because he was lead to believe that there was no evidence to form the basis of any defense. However petitioner has been able to discover, despite the states erectment of a barrier in the form of the inn-effective assistance of trial counsel, evidence which affirmatively shows that petitioner did not shoot Rushing & corroborates that petitioner did not intend Rushing's death. This same evidence provides the basis for petitioner to mount a defense that the murder of Rushing was the result of the independent impulse of Snodgrass &Templer; a defense that is recognised in the State of Texas, FINCHER V. STATE, 980 S.W.2d 886(1998). Additionaly in a case similar to petitioner's

The Texas Court of Criminal Appeals found that a defendent may only be convicted on the basis of his own conduct, GOFF V. STATE OF TEXAS, 931 S.W.2d 537, REH DENIED,CERT. DENIED, 117 S.CT. 1438. For petitioner's defense counsel to advise him to plead guilty to having actually caused Rushing's death by shooting him with a firearm, without first performing an investigation which would show two nonaccomplice witnesses (Gratzinger & Jones) who would testify that it was actualy Snodgrass & Templer who had confessed to them to in fact shot Rushing, thus providing petitioner with evidence to refute the elements of his charged offense, has been determined to be the nonfunctional advocacy of defense counsel, CRONIC, & STRICKLAND. Petitioner would assert that the Supreme Court has determined that a plea of guilty is not a knowing & voluntary act without defense counsel's reasoned assesment of the law in relation to the facts & advice on the defenses to the crime a defendent is charged with. Petitioner would pray tne, that this Supreme Court find that the State Court denial of Petitioner's I.A.C. claims is directly contrary to the findings of the Supreme Court's precedents. The petitioner would also pray that the Supreme Court find that the District Court's finding that petitioner made a voluntary & knowing plea is in direct contravention to the Supreme Court's precedents.

Petitioner further argues that, but for the denial of a constitutional right (I.A.C. of defense counsel commissioned through the states concealment of exculpatory evidence and / or defense counsels failure to investigate), no ratinal factfinder would have found beyond a reasonable doubt that : on or about the 13th day of September, 1992, (defendent Michael Colbaugh), did then there **INTENTIONALLY** CAUSE THE DEATH OF AN INDIVIDUAL, ROGER RUSHING, **BY SHOOTING** ROGER RUSHING **WITH A FIREARM**, AND THE SAID DEFENDENT WAS THEN AND THERE IN THE COURSE OF COMMITING AND ATTEMPTING TO COMMIT THE OFFENSE OF ROBBERY AND KIDNAPPING, OF ROGER RUSHING.

The petitioner's judgement reflects that the charging instrument was an indictment. Ther is a presumption that the judgement says what it was meant to say, See HILL V. WAMPLER, 298 U.S. 460, 56 S.CT. 760(1936). The State charged petitioner with the capitol murder of Rushing, based upon the theory that it was the conduct of the petitioner that factually caused the death of Rushing, by shootin g him with a firearm. The State is constrained therefor to proove beyond a reasonable doubt every element of the crime with which the petitioner is charged, See UNITED STATES V. GAUDIN, 515 U.S. 506,510, 115 S.CT. 2310 & IN RE WINSHIP, 397 U.S. 362, 90 S.CT. 1068. In Winship, pg 1072, the Supreme Court reasoned that ... the reasonable doubt standard plays a vital role in the American scheme of crimional procedure. It is a prime instrument for reducing the risk of convictions resting on **FACTUAL ERROR.** Petitioner has asserted that he is actually innocent & that he is factually innocent at both the state & federal proceedings preceeding this writ of certiorari. Petitioner was able to provide copies of the state court records that were made in the trials of Snodgrass & Templer to the State & Federal habeas courts, which petitioner believes shows that he is actually/factually innocent of the crime he is charged with commiting. There is a presumption that fact finding made by a sate court is correct under 28 U.S.C. 2254(e)(1). Petitoner would ask this court to note that the Honorable panel of Justices from the Second Appellate District Court of Fort Worth, in the cae Snodgrass V. State of Texas, No. 0492753, appellate record No. 2-94-436-CR made a finding of facts in that appeallate opinion that unequivocally reveals that petitoner Colbaugh Did not shoot Rushing...Colbaugh left Rushing with Snodgrass & Templer... and began walking toward the car. In the State's answer (to petitioner's second state writ) the state conceeded that petitioner did not shoot the victim. In the State's answer to (petitoner's first) federal writ of habeas corpus the State argued that petitoner ~~knew the~~

was aware that the complainant was going to be shot. The state interjected an element that differs from that proposed at petitioner's bench trial, as it was tried. In its answer, the state abandoned its position that petitioner actually caused the death of Rushing by shooting him with a firearm. In essence the state has conceeded that petitoner has not committed the conduct that serves as the factual basis of his murder conviction. Petitioner would urge the court to look at its reasoning in BOUSLEY V. UNITED STATES, 523 U.S. 614, 118 S.CT. 1604(1998) TO note, as it did in BOUSLEY, it is important to note that actual innocence ~~me~~ **means factual innocence**. In this casethe state asserts that a provision of the law the petitoner was not charged with, is the reason to uphold his murder conviction upon a factual basis that is untrue, because if he were retried under the elements of the law he was not charged with there is likely to be the same result (a conviction for 1st degree murder with an deadly weapon finding that the petitioner used or exibited a firearm in the commission of the offense). However petitioner finds this assumption to be patently absurd, and directly contrary to established Supreme Court precedent in COLE, DUNN, & McCORMICK.

The petitioner, ~~it~~ is important to note, would have the benefit of non-accomplice testimony(that he otherwise would not have had) to corroborate his defense that he did not shoot thecomplainant, that his other actions that night were not made with the intent to promote or assist the death of the complainant, that petitioner did not believe the complainant would be shot, that an accomplice witness testified that he also did not believe the complainant would be shot, that two men, Snodgrass & Templer, had each confessed to the killing being conducted by themselves, each man confessing to have shot the complainant 5 times (Snodgrass) with a .45 pistol & 3 times (Templer) with a shotgun (which the autopsy examiner,DR. M. Krouse,testified as to being the number of gunshot wounds the complainant received), and the judicial finding of facts that...

Colbaugh left Rushing with Snodgrass & Templer (alive)...and began walking back towards the car (after repeatedly hearing Snodgrass say that he would let the complaianant go). Petitoner avers that under these set of factual circumstances the result of the proceeding would have been very different. A Juror may have been put on notice that Petitioner did not murder the decedent, nor was petitioner present when the decedent was in fact murdered. The trial Court could have very well found that Snodgrass & Templer murdered the decedent instead of finding that Colbaugh murdered the decedent & refused to allow Colbaugh to plead guilty under a factual basis that is materialy untrue as contemplated by the Supreme Court in Townsend V. Burke, 334 u.s. 736, 68 S.CT. 1252(1948) & its progeny. A trial court presented with this evidence may also declined to accept this plea on the basis that it was involuntary/uninteligent/unknowingly made when it realised that petitioner had not been advised of the true nature of the charge against him, or the defenses thereto, when such strong evidence that someone else in fact committed the murder was brought to the Court's attention. The petitioner himself, had he known such evidence existed, or that the evidence provided such strong support for his only viable defense, would have chosen to go to trial,where a jury hearing the evidence could conclude that Colbaugh was not culpable for the murder & perhaps sentenced Colbaugh to les than a life sentence for the offense of robbery (the same offense that J.Offutt was eventually convicted of). A trier of fact may only have sentenced Colbaugh to a term of 30 years, and then found that Colbaugh did not personally use or exhibt a deadly weapon in the commision of the offense or the immediate flight therefrom (a sentence given to J.Offutt).Thus Colbaugh would present to The Supreme Court that the District Court's order finding that Colbaugh did not provide sufficient credible evidence to undermine confidence in the outcome of the trial unless the Court was also convinced that the trial was a free from constitutional error is a finding in direct contravention to Supreme Court precedent & would warrant granting reversal of the district court's order

denying Petitioner's writ of habeas corpus.

Petitioner urges the Supreme Court to consider thAT the evidence he brings forward now is the trial tested, crossexamined, appellate court verified testimony of nonaccomplice witnesses that the State of Texas itself found credible enough to offer as proof of evidence that Snodgrass & Templer actually shot Rushing to death in a manner that excludes Colbaugh from physically causing Rushing's death by shooting him with a firearm. The trial courts returned guilty verdicts against Snodgrass & Templer, the appellate courts affirmed their Convictions, the appellate court in Snodgrass' trial issued an opinion stating facts that raise a reasonable doubt as to whether Colbaugh factually caused Rushing's death by shooting him with a firearm. In Snodgrass' trial the court reporter captures in the = transcript an exchange of dialogue between Snodgrass defense attorney (Kaufmann) & the prosecutor,which reveals that exculpatory evidence (exculpating Colbaugh) was given to the prosecutor the week before. Begining in the trial court record of cause No. 0492753, The State of Texas v. Johnny Snodgrass, VOL.IV, pgs 55-61, Defense attorney Kaufman, on August 23rd, 1994, objected to incriminating statements (which incriminated Snodgrass). The evidence of these incriminating statements was to be provided by a nonaccomplice witness against Snodgrass, one Jaime Gratzinger. On the face of the court record Kaufman states that (A.D.A) prosecutor Harding admitted to her to having only come into possession of the information (J. Gratzinger's witness statements made to the police) the week before, See TR/R PG 56 LINE 7, supplied with petitioner's original federal writ of habeas corpus. Prosecutor Harding admits to receiving the statement of gratzinger & then Refining it to say that Snodgrass shot Rushing with a .45 pistol. Thus, the week before 08/23/1994, theprosecutor received evidence from the police,that the prosecutor then developed to reveal a nonaccomplice witness who actually

made a statement o to the police on 10/22/1992 (the day after petitioner was arrested for the murder). The statement of Gratzinger was admitted into evidence as State's exhibit No. 27 in Snodgrass trial. This original statement led the prosecutor to develop a set of facts that J. Gratzinger was a witness, who had stated to the police that petitoner told her he didn't shoot the guy, but that he was there, Snodgrass admitted to her that he had shot the guy (the complainant). The prosecutor then went on to interview Gratzinger in the week before 08/23/1994 to dicover Snodgrass had told her, he was very specific in telling her that he was one of the guys who had shot the guy(complainant) with the .45 caliber pistol. Gratzinger then testified at trial that Snodgrass had told her who was involved in the shooting, stating that he (Snodgrass) said Jack (Jackie Templer), See TR/R Snodgrass, VOL VII. PG 630-631, supplied with petitioner's original writ of habeas corpus (federal). Thus this witness was found by the prosecution after petitioner had entered a plea of guilty on July 29,1994; This witness was found before petitioner was sentenced & judged on 11/03/1994. This witness was not revealed to petitioner. This witness could have provided exculpatory evidence that corroborated petitioner's defense that the murder was committed by Snodgrass & Templer. The prosecutor had a duty to disclose this evidnce to petitioner under Supreme Court precedent set forth in **BRADY V. MARYLAND 373 U.S. 1983,** & **KYLES V. WHITLEY, 514 U.S. ~~418~~-----419.** The prosecution has an additional affirmative duty to disclose the after acquired information that cast doubt upon the **correctness** of Applicant's conviction, SeeIMBLER V. PACTMAN 424 U.S. 409,427. Had this evidence been given to the petitioner, he would have insisted on a trial where the evidence could be put forth to corroborate his defense that he di not intend the decedent's death.

In the face of such clear evidence that petitioner did not factually cause

the death of Roger Rushing by the specific means alleged in his charging instrument, the prosecutor,being well versed in thelaw could not sustain the charges made against Colbaugh on proof of evidence beyond a reasonable doubt. The prosecutor knew that Colbaugh had not factually caused the decedent's death. The prosecutor knew that the autopsy examiner, DR. Marc Krouse, would testify that there were only 8 gunshot wounds to the victim. The prosecutor knew that two nonaccomplice witnesses would testify that Snodgrass & Templer had each confessed to them to have respectively9 shot the complainant,5 times with a .45 pistol & 3 times with a shotgun. The prosecutor knew that at least one nonaccomplice witness (Gratzinger) would corroborate that petitioner did not intend the decedent's death. The prosecutor cannot have believd that after Snodgrass & Templer were convicted of factually causing Rushing death by shooting him with a firearm that it was appropriate to continue petitioner's plea agreement to have actully caused complainant's death by shooting him with a firearm & then to pass into the court record a Pre-Sentence Investigation Report that statesthat the D (defendent) shot the victim with his hangun . Petitioner would aver that the Supreme Court precedent found BERGER V. UNITED STATES 295 U.S. 78, would afford the prosecution guidance that it may strike hard blows, but not ones calculated to achieve an unjust result. At no time has the prosecution ever maintained anything other than that it was Colbaugh who caused the death of Rushing by shooting him with a firearm, when the State sought to prosecute Colbaugh. Now that it is factually proved that Colbaugh did not cause Rushing's death by shooting him with a firearm, it is unjust, as determined by the Supreme Court precedent, for the state to maintain that Colbaugh is still guilty by trying to revise the basis under which the petitioner was found guilty, simply because (in the State's opinion) the same result would likely obtain on a retrial,See, COLE, DUNN; & McCORMICK V. UNITED STATES,111S.CT. 1807.

Petitioner avers that the denial of his claims by the TX.C.C.A. in his second state habeas writ are not an abuse of the writ as this language is not included in the TX.C.CA order, denying without a written order Petitioner's second state habeas writ. Petitioner avers that the writ was presented to the state court in a good face effort to allow the state court to correct the inegvitable errors that ocurr in judgement & sentenceing.

Petitioner avers that the resolution of his second state habeas claims by the TX.C.C.A. is a ruling on the merits of his claims that is interwoven with the federal constitutional questions raised & should be construed as a state court ruling applying federal law, See MICHIGAN V. LONG, 463 U.S. 1032, 103 S. CT.3469. Petitioner avers that the state court ruling resolving Petitioner's claims is in direct contravention to Supreme Court precedentin TREVINO, MARTINEZ, McQUGGEN,, STRICKLAND, CRONIC,HILL, BOUSLEY, SCHLUP V. DELOL 513 U.S. 298, McQUIGGIN V. PERKINS 133 S.CT.1924 & others cited previously.
Petitioner avers that he has raised credible evidence(state court record presumed to be correct under 28 U.S.C. 2254(e)(1)), not put before the trier of facts, that raises a reasonable probability of a different result.
Petitioner avers that the District Court resolution of his federal Claims in federal court are directly contrary to Supreme Court precedent cited herein.
Petitioner avers that the Fifth Circuit ruling denying a C.O.A. is directly contrary to thSupreme Court precedent that the effective assistance of counsel applies to the plea process, or that no counsel on appeal, or initial collateral review is cause to excuse a procedural default, or that the constitutional error complained of has probably resulted in the conviction of one who is actually innocent such that the Fifth Circuit would find the District Court's order denying Petitioner's writ of habeas corpus to be correct.

Petitioner would ask the Supreme Court to grant Certiorari to resolve these issues of constitutional error.

IMPORTANCE OF THE QUESTIONS PRESENTED

This case presents fundamental questions interpreting the 5th, 6th & 14th amendments to the United States Constitution. The questions presented is of great importance to the public as it affects are most basic understanding of what defines our rights as citizens of these great United States.The right to the effective assistance of counsel, the right to a fair trial, the right to due process, the right of the acused to have notice of the charges against him, the right of the acused to present a defense, the right to not be held in incarceration except upon conviction of an offense on proof beyond a reasonable doubt, the right of citizens to seek redress of grievances against their government. All of these rights help define us as a Nation that is set apart as a people who will uphold the law. The importance of these questions are magnified considering that the lower courts are split in their decisions in regards to, the prosecutions withholding of exculpatory evidence rendering a citizens decision to enter a guilty plea involuntary/unknowing or unintelligent. Guidance from the Supreme Court in this realm of the law is paramount. We are a nation of laws, it is one standard by which we measure our duty to our country. For us to understand our duty, we must understand how our laws are defined by the Supreme Court of the United States. The Supreme Court has reasoned that the right to the effective assistance of counsel applies to the plea process. Will the Supreme Court please advise how interference with the defense affects the rights of a citizen who is deciding what plea to enter?

CONCLUSION

For the foregoing reasons, petitioner avers that the issues are debateable among jurist of reason & that certiorari should be granted in this case.

Respectfully submitted,

MICHAEL COLBAUGH
TDCJ-ID #688832
RT. 2 BOX 4400
GATESVILLE, TEXAS 76597

I, Michael Colbaugh, do declare under penalty of perjury that I have placed this Writ of Certiorari in the prison mailbox on March 07 ,2018, with the appropriate first class postage prepaid. I make this declaration as an inmate's unsworn declaration pursuant to 28 U.SC. § 1746 Michael Colbaugh
pETITIONER

I, Michael Colbaugh do further declare that I have filed a motion to proceed InForma Pauperis with this petiton for the Writ of Certiorari by placing the same in the prison mailbox on March 07 ,2018, inside of the envelope containing this petition. I declare under penalty of perjury thAT all facts stated herein are made upon the information & belief that they are true & that I have not deliberately altered the court documents offered in the support of this petition. I make this declaration under the provision of 28 U.S.C. § 1746, an inmate's unsworn declaration.

Michael Colbaugh
Petitioner

Michael Colbaugh,
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