No. 18-7637

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2018

Fidencio Valdez
Petitioner

v.

The State of Texas
Respondent

ON PETITION FOR WRIT OF *CERTIORARI* TO
THE COURT OF CRIMINAL APPEALS OF TEXAS

Petitioner's Reply Brief

COMES NOW, Fidencio Valdez, Petitioner, and respectfully files his reply to "The State's Brief in Opposition to Petition for Writ of *Certiorari*," filed on the 26th of February, 2019, and would show the Court, initially, that, throughout its brief in opposition, the State faults Petitioner and his attorneys for the failure to raise Petitioner's claim pursuant to ***McCoy v. Louisiana***, 584 U.S. _____ (No. 16-8255; May 14, 2018), at an earlier point in the proceedings, and/or suggests that the Court of Criminal Appeals of Texas has decided the issue on independent state grounds; and

that he failed to present his claims to the Court of Criminal Appeals. Petitioner asserts that there was no substantive reason for him to have raised his ***McCoy*** claim earlier and that both his due process and equal protection claims were present to the court below. In that regard, Petitioner would show the Court as follows:

I

In its first "question," the State of Texas argues that the decision of the court below "rests on state-law procedural-default grounds that are independent of the federal question and adequate to support the CCA's judgment." Petitioner respectfully suggests this is an invalid argument.

The Court of Criminal Appeals' unpublished Order of October 3, 2018, sets out no basis to believe its actions were based on any independent state grounds. After the two-page Order set out the procedural facts, it stated:

> We have reviewed the subsequent application and find that Applicant has failed to satisfy the requirements of Article 11.071, § 5(a). Accordingly, we dismiss the subsequent application as an abuse of the writ without considering the merits of the claims.

Section 5(a) of Article 11.071 provides three bases for the ability to submit a subsequent application in a capital case:

❶ the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;

❷ by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or

❸ by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071, 37.0711, or 37.072.

Petitioner asserts that it is clear that none of these apply to his case. The second and third provision would not appear to apply to the instant case. However, although the first provision does apply because the factual bases for the claims made in the subsequent *habeas corpus* application were known at the time of

the filing of the initial application, there was no legal basis on which to base the claim at the time of the initial filing.

The claims made in the subsequent *habeas corpus* application were based on the holding in ***McCoy***, meaning the legal basis was not available until the decision in ***McCoy*** was delivered. Thus, it would appear that, in dismissing the subsequent application, the Court determined that the legal basis was, in fact, available before ***McCoy***, and that, accordingly, Applicant could have raised the ***McCoy*** claim in the original application.

For the Court of Criminal Appeals to have dismissed Petitioner's subsequent *habeas corpus* application because the legal basis was available when the initial *habeas corpus* application was filed, no independent state ground would be involved. Rather, the dismissal would have to have been based on an interpretation of ***McCoy***. Additionally, as previously asserted in the *certiorari* petition now pending before the Court, it is clear that the Court of Criminal Appeals's interpretation of ***McCoy*** is faulty.

In ***Turner v. State***, No. AP-76,580 (Tex.Cr.App.; November 14, 2018), the Court of Criminal Appeals held that "a defendant cannot simply remain silent before and during trial and raise a ***McCoy*** complaint for the first time after trial." ***Turner***, slip op at 42. For that proposition, the Court cited the discussion in ***McCoy*** of ***Florida v. Nixon***, 543 U.S. 175 (2004):

> Nixon's attorney did not negate Nixon's autonomy by overriding Nixon's desired defense objective, for Nixon never asserted any such objective. Nixon "was generally unresponsive" during discussions of trial strategy, and "never verbally approved or protested" counsel's proposed approach. 543 U.S., at 181, 125 S.Ct. 551. Nixon complained about the admission of his guilt only after trial. Id., at 185, 125 S.Ct. 551. McCoy, in contrast, opposed English's assertion of his guilt at every opportunity, before and during trial, both in conference with his lawyer and in open court. See App. 286-287, 456, 505-506. See also Cooke, 977 A.2d, at 847 (distinguishing Nixon because, "[i]n stark contrast to the defendant's silence in that case, Cooke repeatedly objected to his counsel's objective of obtaining a verdict of guilty but mentally ill, and asserted his factual innocence consistent with his plea of not guilty"). "If a client declines to participate in his defense, then an attorney may permissibly guide the defense pursuant to the strategy she believes to be in the defendant's best interest. Presented with express statements of the client's will to maintain innocence, however, counsel may not steer the ship the other way.

McCoy, slip op. at 8-9.

There are two problems with the Court of Criminal Appeals' statement in ***Turner***. First, ***McCoy*** does not support the Court's conclusion, because nothing in ***McCoy*** requires that the supporting facts to appear in the record. Second, while the idea that the ***McCoy*** objection must appear in the record makes sense in a direct appeal case, and both ***Nixon*** and ***McCoy*** are direct appeal cases, the theory makes no sense in a *habeas* proceeding, where claims must be non-record claims, and cannot be based on the record. If the ***Turner*** Court was holding that the structural issue identified in ***McCoy*** cannot be raised on post-conviction *habeas corpus*, that holding is unsupported at law and/or logic.

Further, in the instant case, it is clear that trial counsel knew his client maintained his innocence and presented counsel with an alibi. To the extent that the Court of Criminal Appeals may have dismissed Petitioner's subsequent *habeas corpus* application based on ***McCoy*** because Petitioner did not voice his objections on the record or to counsel off-the-record, the cited passage in ***McCoy*** does not support that decision. The statement in ***McCoy*** is based

only on the scenario involving a defendant declining to participate. If Petitioner failed to participate, as counsel would have it, that failure was based entirely on counsel's failure to follow Petitioner's wishes by investigating and presenting his alibi defense. Petitioner's failure to control his attorney should not be held against Petitioner, but, as in ***McCoy***, against the attorney.

The Court of Criminal Appeals has long held that the appropriate fact finding forum is in the trial courts. ***Ex parte Rodriguez***, 334 S.W.2d 294, 294 (Tex.Cr.App. 1960). This is a policy to which that court continues to conform.[1] Nevertheless, as it does in many cases involving subsequent *habeas corpus* applications,[2] the Court apparently chose not to include the trial court in any fact finding in the instant case.

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[1] See, e.g., ***Ex parte Thrasher***, No. WR-89,537-01; ***Ex parte Smith***; No. WR-89,540-01; ***Ex parte Hawthorne***, No. WR-89,554-01; and ***Ex parte Wray***, No. WR-89,556-01; each of which are *habeas corpus* cases remanded on March 6, 2019, to the particular trial courts for fact finding.

[2] See, e.g., ***Ex parte Preyor***, WR-72,660-04 (Tex.Cr.App. July 24, 2017); ***Ex parte Wilkins***, No. WR-75,229-02 (Tex.Cr.App. January 4, 2017); ***Ex parte Sells***, No. WR-62,552-04 (Tex.Cr.App. March 31, 2014). In each case, the subsequent claims were dismissed in an unpublished "Order," and the portion of the Order dismissing the application utilizes language which is almost identical to that used in the instant case.

Whether the Court of Criminal Appeals dismissed the subsequent application in this case because there was no objection during trial is unknown, because of the summary nature of the dismissal Order. There is nothing to suggest, however, that the decision was premised on any independent state ground.

II

In its second and third "questions," the State of Texas asserts that Petitioner did not properly raise his due-process and/or equal protection challenges to article 11.071, section 5(a), in the Court of Criminal Appeals, and, thus, the ***McCoy*** issue is not properly before this Court. This is wholly inaccurate.

In that regard, it should be noted that the Court of Criminal Appeals' discussion of ***McCoy*** in the direct appeal from this conviction and its distinguishing of the facts of this case and those of ***McCoy*** did not occur until June 20, 2018. This is nearly eleven months after Petitioner's initial *habeas corpus* application was filed. Clearly, the Court of Criminal Appeals' appellate action in this case, taken, as it was, after the filing of the initial application,

cannot act as a bar to either the initial application or the subsequent filing, and the State of Texas' reliance on subsequent events is misplaced.

It should also be noted that, although the State suggests Petitioner should have been aware of the pendency of the issue in ***McCoy*** on which he relies, there is no reason that Petitioner's lawyers should have been aware of that issue. Petitioner's initial *habeas corpus* application was filed on July 28, 2017. *Certiorari* was not granted in ***McCoy*** until September 28, 2017, two months after Petitioner's initial *habeas corpus* application was filed.

It should be further noted that, although the State implies that Petitioner could have sought rehearing of the Court of Criminal Appeals decision of October 3, 2018, by filing a timely motion for rehearing under Rule 79.1, of the Texas Rules of Appellate Procedure, this assertion is legally inaccurate.

Petitioner would show the Court that, under Texas' appellate rules, "rehearing" of the decision at issue was simply not available

to Petitioner. The State cited to Rule 79.1, but failed to cite to Rule 79.1(d), which provides:

> A motion for rehearing an order that denies habeas corpus relief or dismisses a habeas corpus application under Code of Criminal Procedure, articles 11.07 or 11.071, may not be filed. The Court may on its own initiative reconsider the case.

The challenged decision of the Court below was an order that dismissed a *habeas corpus* application "under Code of Criminal Procedure, articles 11.07 or 11.071." Thus, a motion for rehearing to the Court of Criminal Appeals' decision of October 3, 2018, was not permitted by the rules.

Further, the second sentence of Rule 79.1(d), Tex.R.App.Pro., provides that the "Court may on its own initiative reconsider the case." Thus, as the Court of Criminal Appeals has stated, although rehearing from an order denying relief in an *habeas corpus* proceeding is not allowed, "we may reconsider the case on our own initiative." ***Ex parte Chavez***, 371 S.W.3d 200, 213 (Tex.Cr.App. 2012)(FN 11); see also ***Ex parte Moreno***, 245 S.W.3d 419, 427-429 (Tex.Cr.App. 2008). That Court has never, through its rule-making authority or otherwise, defined any method by which

litigants can invoke, much less require, reconsideration on the Court's "own initiative," and has specifically stated that they are not required to do so. ***Moreno***, 245 S.W.3d at 428.

What has informally evolved in cases in which rehearing is not available is a practice by which *habeas corpus* applicants who wish to have their applications subject to further review will file a motion or "suggestion" that asks the Court of Criminal Appeals, on its own initiative, to reconsider its ruling. See ***Moreno***, 245 S.W.3d at 422; ***Ex parte Reynoso***, 257 S.W.3d 715, 716 (Tex.Cr.App. 2008); see also ***Ex parte Wood***; No. WR-45,746-02 (Tex.Cr.App. December 12, 2018). Petitioner submitted such a suggestion on November 28, 2018 (a true and correct copy of which is attached in an appendix.

Petitioner did present both his due process and equal protection claims to the attention of the Court of Criminal Appeals (see PP 7-12 of the appendix). To date, there has been no action taken on Petitioner's suggestion, and the Court of Criminal

Appeals has written that Rule 79.1(d) does not mean that it is bound to reconsider its decisions. ***Moreno***, 245 S.W.3d at 428.

Conclusion

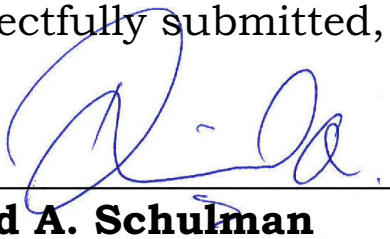
The Court of Criminal Appeals' decision to dismiss without consideration of the merits of Petitioner's subsequent *habeas corpus* action was not based on any independent state grounds. Additionally, Petitioner did present both his due process and equal protection claims to the Court of Criminal Appeals before submitting the instant *certiorari* petition.

Prayer for Relief

The above premises considered, Fidencio Valdez, Petitioner, respectfully prays that this Honorable Court will deem timely and grant his petition for writ of *certiorari* to the Court of Criminal Appeals of Texas, and, upon review, hold that Article 11.071 § 5(a), and the actions of the Court of Criminal Appeals of Texas have violated Applicant's rights to due process and equal protection, as well as the rights to due process and equal protection due and owing to all *habeas corpus* applicants who have been condemned

to death. Applicant further prays the Court will vacate the Court of Criminal Appeals' order of October 3, 2018, and will remand this case for further proceedings.

Respectfully submitted,



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