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

Appendix to Reply Brief

Exhibit	**Item**
A.	Petitioner's "Suggestion Pursuant to Rule 79.2 (d) of the Rules of Appellate Procedure, that the Court Reconsider, on Its Own Initiative, the Dismissal of Applicant's Subsequent Application for Writ of Habeas Corpus," dated November 28, 2018.

WR-85,941-02
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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No. WR-85,941-02

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS, AT AUSTIN

Ex parte Fidencio Valdez

Suggestion Pursuant to Rule 79.2 (d) of the Rules of Appellate Procedure, that the Court Reconsider, on Its Own Initiative, the Dismissal of Applicant's Subsequent Application for Writ of *Habeas Corpus*

TO THE HONORABLE JUDGES OF SAID COURT:

COMES NOW, David A. Schulman and Angela Moore, court appointed counsel for Applicant in the above styled and numbered cause, and John G. Jasuta, co-counsel, hereinafter collectively referred to as "*habeas* counsel," and respectfully suggest that, on its own initiative, the Court reconsider its ruling dismissing Applicant's subsequent application for post-conviction writ of *habeas corpus* in the instant case, and would respectfully show the Court:

I

Applicant filed his original application for post-conviction writ of *habeas corpus* pursuant to Article 11.071, C.Cr.P. ("the original

application"), on July 28, 2017. On July 6, 2018, Applicant filed his "Subsequent Application for Post-Conviction Writ of *Habeas Corpus* Pursuant to Article 11.071, C.Cr.P." ("the subsequent application") with the Clerk of the convicting Court. The subsequent application was received at the Court of Criminal Appeals on July 28, 2018.

On October 3, 2018, the Court determined that Applicant "Applicant has failed to satisfy the requirements of Article 11.071, § 5(a)," and summarily dismissed the subsequent application. Other than determining that section 5(a) had not been satisfied, the Court provided no explanation as to why it was dismissing the writ application.

II

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.

The second and third provision would not appear to apply to the instant case, nor did Applicant suggest they applied. Moreover, Applicant has not suggested in any way that the factual basis was not known at the time the original application was submitted. Rather, the subsequent application was based on the holding of the Supreme Court of the United States in ***McCoy v. Louisiana***, 584 U.S. _____ (No. 16-8255; May 14, 2018), 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.

Applicant respectfully suggests that, if this is in fact the reason the subsequent application was dismissed, the Court should have made this known to the bench and bar. The Court should make known to the bench and bar how one "gets by" the "one writ" provision in section 5, as the case law is not clear and the holding in the instant case offers guidance to neither Applicant nor the bench and bar.

III

Recently, in the majority opinion in ***Turner v. State***, No. AP-76,580 (Tex.Cr.App.; November 14, 2018), the Court said 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's 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 on direct appeal, and both ***Nixon*** and ***McCoy*** are direct appeal cases, this 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.

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 may have denied permission to seek habeas relief based on ***McCoy*** in the subsequent application in the instant case because Applicant did not voice his objections on the record or to counsel off-the-record, the cited passage in ***McCoy*** wouldn't support that decision because the statement in ***McCoy*** is based only on the fact of a defendant declining to participate. If Applicant failed to participate, as counsel would have it, that failure was based entirely on counsel's failure to follow Applicant's wishes by investigating and presenting his alibi defense. Applicant's failure to control his attorney should not be held against Applicant, but, as in ***McCoy***, against the attorney.

Moreover, as with the discussion in paragraph II, whether the Court dismissed the subsequent application in this case because there was no objection during trial is unknown, because of the

summary nature of the Court's Order. The Court should make known to the bench and bar whether a defendant's failure to voice his or her objections to trial counsel's strategy constitutes a waiver of that claim for both appellate and *habeas* purposes.

III

Applicant asserts that Article 11.071 § 5(a) denies due process and equal protection, both on its face and in the manner in which the Court has applied it. Applicant asserts this claim in three variations:

❶ First, because it requires a *habeas* applicant in a capital case to complete all investigation and file all claims by a certain date, even when the time period permitted is unreasonable under the facts of a case, the statute denies due process on its face.

❷ Second, because the Court has failed to explain to the bench and bar how to satisfy the restrictions in section 5(a) and by explaining why particular claims in many *habeas* cases have failed to satisfy the requirements of section 5(a), the Court has denied every applicant in a capital *habeas case* due process.

❸ Finally, because it provides more process to a capital *habeas* applicant who was sentenced to life than it does

to a capital *habeas* applicant who was sentenced to death, the statute denies equal protection.

Due Process

The liberty protected by the Due Process Clause is not a creation of the Bill of Rights. Indeed, the United States has long recognized that the liberty safeguarded by the Constitution has far deeper roots. See the second paragraph of the Declaration of Independence, finding it self-evident that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights," among which are "Life, Liberty, and the pursuit of Happiness."

The "most elemental" of the liberties protected by the Due Process Clause is "the interest in being free from physical detention by one's own government." ***Hamdi v. Rumsfeld***, 542 U.S. 507, 529 (2004) (plurality opinion); see ***Foucha v. Louisiana***, 504 U.S. 71, 80 (1992)("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause"). Although a valid criminal conviction justifies punitive detention, it does not entirely eliminate the liberty interests of

convicted persons. For while a prisoner's "rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country." ***Wolff v. McDonnell***, 418 U.S. 539, 555–556 (1974); ***Shaw v. Murphy***, 532 U.S. 223, 228–229 (2001) ("Incarceration does not divest prisoners of all constitutional protections").

The jurisprudence of the Supreme Court of the United States has recognized protected interests in a variety of post-conviction contexts, extending substantive constitutional protections to state prisoners on the premise that the Due Process Clause of the Fourteenth Amendment requires States to respect certain fundamental liberties in the postconviction context. See, e.g., ***Thornburgh v. Abbott***, 490 U.S. 401, 407 (1989)(right to free speech); ***Turner v. Safley***, 482 U.S. 78, 84 (1987)(right to marry); ***Cruz v. Beto***, 405 U.S. 319, 322 (1972)(right to free exercise of religion); ***Lee v. Washington***, 390 U.S. 333 (1968)(right to be free

of racial discrimination); ***Johnson v. Avery***, 393 U.S. 483 (1969 (right to petition government for redress of grievances). On can simply not question the basic proposition that convicted persons such as Applicant retain a constitutionally protected measure of interest in liberty. In short, Applicant is entitled to due process during his *habeas corpus* proceedings.

To the extent it can be read to deny Applicant the opportunity to litigate a claim that did not arise until after the original application was filed, Article 11.071 § 5(a), denies Applicant due process. By finding he has not satisfied the requirements of Article 11.071 § 5(a), the Court denies dues process to Applicant, and all capital *habeas* applicants whose subsequent applications have been summarily dismissed without explanation.

Equal Protection

The Equal Protection Clause of the Fourteenth Amendment "is essentially a direction that all persons similarly situated should be treated alike." ***Lawrence v. Texas***, 539 U.S. 558, 579 (2003); see also ***Cleburne v. Cleburne Living Center, Inc.***, 473 U. S. 432,

439 (1985); ***Plyler v. Doe***, 457 U. S. 202, 216 (1982). Applicant asserts that Chapter 11, C.Cr.P., fails to satisfy that standard, due to slight differences in Article 11.07 § 4(a), and Article 11.071 § 5(a).

In the instant case, Applicant was sentenced to death. Thus, pursuant to Article 11.071 § 5(a), any claims discovered and "filed after filing an initial application," are treated as "subsequent applications," and are subject to the "one writ" rule. Had the trial turned out differently and Applicant received a life sentence, all claims discovered and "filed after filing an initial application," would not be subject to the "one writ" rule so long as they were filed before "final disposition of an initial application."

In the instant case, Applicant's subsequent application was based on the Supreme Court's holding in ***McCoy***. Despite the fact that the original application was filed before ***McCoy*** was delivered, Applicant's ***McCoy*** claim is subject to the "one writ" rule. Had Applicant been sentenced to life without parole, his ***McCoy*** would not be subject to the "one writ" rule, because the original

application remained pending and there had been no final disposition.

Applicant asserts that it is unconscionable to give less process to a capital *habeas* applicant than would be provided to him if the jury had instead returned a life sentence verdict. Nevertheless, that is exactly what Article 11.071 § 5(a) gives a *habeas* applicant in a capital case, less protection and less process that if he or she had not been sentenced to death, but had received a life sentence for the very same offense.

Prayer

WHEREFORE, PREMISES CONSIDERED, on behalf of Applicant, the undersigned respectfully prays that the Court will reconsider and vacate its Order of October 3, 2018, and, permit the parties to fully brief the relevant issues, and upon reconsideration of Applicant original and subsequent *habeas corpus* applications, will remand the case to the trial court with instructions to include the claims in the subsequent application in the issues it will be resolving.

Respectfully submitted,

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Certificate of Compliance and Delivery

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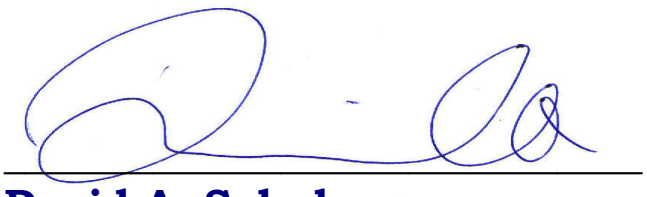

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