

No. _____

18-8721

IN THE

SUPREME COURT OF THE UNITED STATES

REED V. STATE OF TENNESSEE
Petition for Certiorari to the Supreme Court of Tennessee

Kelvin Reed

(Your Name)

vs.

— PETITIONER

FILED

MAR 19 2019

OFFICE OF THE CLERK
SUPREME COURT, U.S.

State of Tennessee — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Court of Criminal Appeals of Tennessee

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Kelvin Reed

(Your Name)

P.O. Box 679

1440 Union Springs Road

(Address)

Whiteville, TN 38075

(City, State, Zip Code)

None

(Phone Number)

QUESTIONS PRESENTED

1. The Tennessee Court of Criminal Appeals and the Tennessee Supreme Court have decided that before an evidentiary hearing will be granted to an Error Coram Nobis petitioner involving newly or subsequently discovered evidence, an Error Coram Nobis petitioner must provide the actual proof to the court, contemporaneously with the petition, via sworn affidavits of those who have personal knowledge. Does such a mandatory provision discriminate against blacks and against those who are poor, thereby violating their United States Constitutional Rights to have Equal Access to the Courts, Equal Protection of the Laws, and Due Process of Law (U.S. Const. Am. 1 and 14)?
2. Does Tennessee's Error Coram Nobis Procedure, via T.C.A. 40-26-105 and binding case law precedents, violate the United States Constitutional Rights of blacks (a suspect group) and of those who are poor, denying both groups equal access to the courts, due process, and equal protection of the laws (U.S. Const. Am. 1 and 14)?
3. Are T.C.A. 40-26-105 and binding Error Coram Nobis case law precedents repugnant to the United States Constitution because they allow more whites to prove actual innocence claims via newly discovered evidence and sworn affidavits than blacks with the same or similar proof?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the Shelby County Criminal court appears at Appendix B to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was 1/18/19. A copy of that decision appears at Appendix C.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

US CONSTITUTION AMENDMENT 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

US CONSTITUTION AMENDMENT 14

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TENNESSEE CODE ANNOTATED 40-26-105. WRIT OF ERROR CORAM NOBIS.

(a) There is made available to convicted defendants in criminal cases a proceeding in the nature of a writ of error coram nobis, to be governed by the same rules and procedure applicable to the writ of error coram nobis in civil cases, except insofar as inconsistent herewith. Notice of the suing out of the writ shall be served on the district attorney general. No judge shall have authority to order the writ to operate as a supersedeas. The court shall have authority to order the person having custody of the petitioner to produce the petitioner in court for the hearing of the proceeding.

(b) The relief obtainable by this proceeding shall be confined to errors dehors the record and to matters that were not or could not have been litigated on the trial of the case, on a motion for a new trial, on appeal in the nature of a writ of error, on writ of error, or in a habeas corpus proceeding. Upon a showing by the defendant that the defendant was without fault in failing to present certain evidence at the proper time, a writ of error coram nobis will lie for subsequently or newly discovered evidence relating to matters which were litigated at the trial if the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial.

(c) The issue shall be tried by the court without the intervention of a jury, and if the decision be in favor of the petitioner, the judgment complained of shall be set aside and the defendant shall be granted a new trial in that cause. In the event a new trial is granted, the court may, in its discretion, admit the petitioner to bail; provided, that the offense is bailable. If not admitted to bail, the petitioner shall be confined in the county jail to await trial.

(d) The petitioner or the state may pray an appeal in the nature of a writ of error to the court of criminal appeals from the final judgment in this proceeding.

Acts 1955, ch.166, sec. 1; 1978, ch.738, sec. 1; modified; T.C.A. 40-3411; Acts 2010, ch.652, sec. 1.

STATEMENT OF THE CASE

Appendix A is a complete copy of the Tennessee Court of Criminal Appeals' decision regarding Appellant's Error Coram Nobis Petition. This "Opinion" outlines, in detail, the facts surrounding Appellant's case. The Court of Criminal Appeals of Tennessee at Jackson denied Appellant relief on August 31, 2018. Discretionary review by the Tennessee Supreme Court was denied on January 18, 2019 (Appendix C). Appellant is well within the 90 day time limit for filing the instant Petition, and this Honorable Court has subject matter jurisdiction. By reference, Petitioner adopts the facts stated on pages 1 thru 6 of Appendix A as the Statement of the Case, as if stated here verbatim.

REASONS FOR GRANTING THE PETITION

1. The Tennessee Court of Criminal Appeals and the Tennessee Supreme Court have decided an important question of federal law that has not been, but should be, settled by the United States Supreme Court, or has decided an important federal question in a way that conflicts with relevant decisions of the United States Supreme Court.

2. Tennessee's Error Coram Nobis Procedure, via T.C.A. 40-26-105 and binding case law precedents, violates the United States Constitutional Rights of blacks (a suspect group) and of those who are poor, denying both groups equal access to the courts, due process, and equal protection of the laws (U.S. Const. Am. 1 and 14).

3. T.C.A. 40-26-105 and binding Error Coram Nobis case law precedents are repugnant to the United States Constitution because they allow more whites to prove actual innocence claims via newly discovered evidence and sworn affidavits than blacks with the same or similar proof.

A

OPENING STATEMENT

In the same vein as slavery are statutory provisions and case law precedents that, on their face, appear to be constitutional, but in actuality are merely a means by which a state can conceal its unconstitutional discriminatory animus against blacks and against those who are poor. Careful scrutiny of Tennessee's Error Coram Nobis statutes and case law precedents will reveal a discriminatory intent to deny blacks and those who are poor equal access to the courts, substantive due process of law, and equal protection of the laws (U.S. Const. Am. 1 and 14).

B

THE STATISTICS

1. There exists a much greater proportion of blacks below the poverty level than whites. More blacks than whites have incomes below the poverty level. (Rogers v. Lodge, 73 L.Ed.2d 1012, 458 U.S. 613, 102 S.Ct. 3272 (July 1, 1982)).
2. The City of Memphis, Tennessee poverty rate for non-Hispanic Blacks such as your petitioner is 32.3%, an increase in more than two percentile points from 2015. At the same time, the poverty rate for non-Hispanic Whites in the city of Memphis has increased slightly to 13.3% in the Memphis Statistical Metropolitan Area. In general, poverty rates for the City of Memphis are higher than poverty rates in Shelby County for every category. (See Appendix D, p. 1).

3. The poor in Memphis tend to be minorities. The poverty rates for Blacks and Latino are higher than the overall poverty rate, and poverty rates for minorities are higher in every age category than poverty rates for non-Hispanic Whites. Moreover, poverty rates for non-Hispanic Whites are lower in Shelby County than in Tennessee as a whole or the United States in every age category. (Appendix D, p. 5).

4. The poverty rates for non-Hispanic Whites are better in Shelby County than for the same group in Tennessee or the United States, while the rates for Blacks are generally worse in Memphis and Shelby County than Tennessee or the nation. (Appendix D, p. 8).

5. The labor market in Memphis tends to consist of unskilled workers in the warehouse industry. The lack of comprehensive, effective, and efficient public transportation also makes progress against poverty very difficult. Finally, the divide between the city and the county, as evidenced by the racial and geographical differences in poverty, tends to deprive the city of Memphis of the funds it needs to support the region. (Appendix D, p. 8).

C

STANDARDS OF REVIEW RELEVANT TO THIS CASE

The judiciary gives strict scrutiny to legislative classifications that may interfere with the exercise of a fundamental right or adversely affect a suspect group. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976). For the poor and indigent, the "strict scrutiny" test should be applied because a fundamental right to equal access to the courts (in the present case at bar) is being affected by the law or ordinance (ie. Tennessee's Error Coram Nobis Statutes and case law precedents), thereby depriving Petitioner equal protection of the laws and due process of law (U.S. Const. Am. 1 and 14). Access to the courts, without question, is a fundamental right of all persons whether incarcerated or not. (Lewis v. Casey, 518 U.S. 343, 346, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996); Bounds v. Smith, 430 U.S. 817, 828, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977)). Under the 14th Amendment, Section 1, a citizen of the United States has a right to be heard in his own defense (Hovey v. Elliott, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215, 1897 U.S. LEXIS 2107 (1897)). The rights under judicial proceedings cannot be taken away without an opportunity to be heard. (Garfield v. U.S. ex. rel. Goldsby, 211 U.S. 249, 29 S.Ct. 62, 53 L.Ed. 168, 1908 U.S. LEXIS 1541 (1908)). One attacking a state statute as repugnant to the Federal Constitution must bring himself within a class with respect to which the statute is unconstitutional (Petitioner's status of being black (a suspect group), as well as poor). (Grolbert v. Board of Railroad Comm'rs, 60 F.2d 321 (S.D. Iowa 1932)). Black's Law Dictionary defines a "Suspect Group" as a statutory classification based on race, national origin, or alienage, and thereby subject to strict scrutiny under equal-protection analysis.

D

APPLICATION OF THE ABOVE FACTS TO THE PRESENT CASE AT BAR

In the Tennessee Trial Court (Shelby County, Memphis), Judge W. Mark Ward was the judge who issued its ruling denying Petitioner relief and an evidentiary hearing. Judge W. Mark Ward writes legal reference materials which are often recited by the Court of Criminal Appeals. Consequently, the CCA upheld Judge W. Mark Ward's judgment based on who he was, not even considering: (A) Petitioner's evidence that would have proved his actual innocence; (B) The witnesses Petitioner would have called to an evidentiary hearing, had one been granted; (C) That Judge Ward had a vested interest in the outcome of this case due to his signature being on a document that Petitioner asserted was questionable or fraudulent; and (D) Judge Ward's erroneous statements of law and of the facts.

The mandatory requirement for affidavits to be included with error coram nobis petitions (see Opinion, Appendix A and decision of Trial Court, Appendix B) is unconstitutional and violates due process of law because it discriminates against blacks (a suspect group) as well as the poor. For the same reasons, such a requirement violates the equal protection clause under the 14th Amendment to the United States Constitution (See CCA opinion, p. 8, top, Appendix A). Consequently, in this respect, State v. Hart, 911 S.W.2d 371 (Tenn. Crim. App. 1995) should be found to be violative of U.S. Const. Am. 14 because it promotes a discriminatory animus. The same holds true for the present case at bar.

In particular, the CCA quoted State v. Hart (CCA Opinion, p. 8, top, Appendix A):

"In addition, petitions for coram nobis relief must be supported by affidavits that are 'relevant, material, and germane' and are based on

the affiant's 'personal knowledge.'"

Because Petitioner only makes 50 cents per hour, he does not have the monetary resources to hire an expert witness or to hire a private investigator who would have provided him with the requisite affidavits to support his claims, and the inmates and/or free-world friends and family members Petitioner contacted were not willing to swear to an affidavit in support of Petitioner's claims and were unable to provide him with the monetary resources to hire the expert witnesses he needed to prove his claims to the courts. So, because of Petitioner's indigence status, and because he is among those non-hispanic blacks who are below the poverty level in Memphis, Tennessee, he is being denied a full and fair hearing regarding his actual innocence claims, and the State Courts seem to not care.

There can be no debate that this type of discriminatory animus affects blacks more than whites based on the overall poverty status of blacks compared to whites. A white male inmate with rich white parents may have been able to hire an expert witness and an investigator who would have provided the required affidavits, while the Petitioner's family members and the Petitioner could not. How could this be fair to blacks in poverty? How could this court find such a law constitutionally based?

Petitioner avers that these are some important questions of law that need to be settled or revisited by this Honorable Court. Prior to presenting his case before the Trial Court, the Petitioner tried to convince his family members to hire him an attorney. Petitioner was unsuccessful, and an innocent man remains incarcerated due to his poverty, based on the color of his skin, and because of an unconstitutional procedural rule that has the unequivocal intent of denying poor and black inmates equal access to the courts in violation of U.S. Const. Am. 1.

Once again, these are important questions that need to be resolved by this Honorable Court, not only as it pertains to the petitioner's case, but to all cases where new evidence of actual innocence is discovered. Inmates in TDOC custody do not have access to the internet, and some do not have any family members who could, or would even want to, assist them with their legal matters. To require sworn affidavits in *coram nobis* proceedings prior to the Court appointing counsel and as a condition precedent to an evidentiary hearing being granted is tantamount to a requirement that inmates or their family members must have enough money and/or other resources to hire an expert witness who would have enough "knowledge" about a particular subject to be willing to swear to its veracity under oath. This is certainly intentional State-Created discrimination against United States Citizens who are in poverty such as Petitioner, as well as a large percentage of the black population who are poor.

To prove Petitioner's allegations in the instant case, Petitioner had to provide affidavits from a competent cell phone technician and from others who had knowledge in their particular fields of expertise (ie. a grand jury foreperson with knowledge, his attorney on direct appeal, and others who could support his serious allegations (CCA Opinion, pp. 8-9, Appendix A). Petitioner was also required to provide additional evidence before an evidentiary hearing would be granted. This rule or requirement completely negates the main reason for a full and fair evidentiary hearing (ie. a forum where a petitioner can present evidence and proof of his allegations). With no phone, internet, attorney, or monetary resources, does this even sound possible for Petitioner to do? That being said, Tennessee's Error Coram Nobis statute and case law precedents make it literally impossible for a petitioner to get an evidentiary hearing to prove his actual innocence,

unless he has the monetary resources to pay for the requisite experts.

In this particular case, the Trial Court and the Court of Criminal Appeals made evidentiary rulings without affording Petitioner a full and fair evidentiary hearing. To wit:

A. "...Reed failed to provide any evidence to substantiate his claim regarding Mary

Thomas ...". (CCA Opinion, p. 8, Appendix A).

B. "Reed attached no affidavits ...". (CCA Opinion, p. 8, Appendix A).

C. "Reed ... provided no credible evidence to substantiate his claims of newly

discovered evidence." (CCA Opinion, p. 8, Appendix A).

D. "Reed's exhibits do not qualify as substantive admissible evidence that may have resulted in a different judgment, had it been presented at the trial."

It must be noted that T.C.A. 40-26-105 says nothing about a requirement of providing proof prior to an evidentiary hearing. The cases cited by the CCA on page 8 of its opinion (Appendix A) broadens and adds to T.C.A. 40-26-105, thereby encroaching on the powers of the Legislative Department to make laws and violating Petitioner's constitutional rights to due process of law, equal protection of the laws, and equal access to the courts (U.S. Const. Am. 1 and 14).

WHEREFORE, PREMISES CONSIDERED, this Honorable Court should grant Petitioner leave to file his Second or Successive Habeas Corpus Petition in the United States District Court and in accordance with Federal Law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Kelvin Reed

Date: MARCH 19, 2019