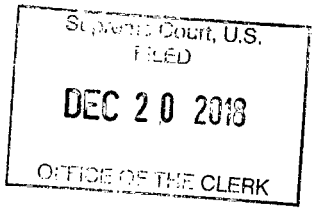
No. 18-8936 ORIGINAL

SUPREME COURT

OF

THE UNITED STATES



William Arthur McIntosh

Vs.

The State of Texas

Petition for Writ of Certiorari to the

United States Supreme Court

From the Texas Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

For Petitioner – William Arthur McIntosh – Pro Se

Robertson Unit

12071 F.M. 3522

Abilene, Texas 79601

For State of Texas - Patrick Wilson

District Attorney of Ellis County, Texas

109 South Jackson

Waxahachie, Texas 75165

QUESTIONS PRESENTED

1. Did the Texas Court of Criminal Appeals rule adversely by denying Petitioners successive writ of habeas corpus when he presented newly available evidence to the State court in accordance with **Schlup v. Delo**, 115 S.Ct. 851 (1995)? Texas made **Schlup** applicable to the State by codifying **Schlup** in **Texas Code of Criminal Procedure section 11.07 section 4.**

2. Did the Texas Court of Criminal Appeals violate the ruling made by the Supreme Court in **Brady v. Maryland**, 373 U.S. 83 (1963) by not remanding and asking the District Court to decide whether or not the prosecution withheld exculpatory evidence?

3. Should **Martinez v. Ryan**, 132 S.Ct. 1309 (2012) and **Trevino v. Thaler**, 133 S.Ct. 1911(2013) be applicable to the Texas State District Courts in order to stop the flood of federal cases addressing Ineffective Assistance of Counsel cases in Texas?

LIST OF PARTIES

William Arthur McIntosh – pro se

TDCJ – ID no. 688254

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For the State of Texas:

Patrick Wilson

District Attorney for Ellis County

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JURISDICTION

On October 10, 2018 the Texas Court of Criminal Appeals denied without written order the petitioners successive writ of habeas corpus. According to Texas Law no re-hearings are possible so no re-hearing was asked for.

The Texas Court of Criminal Appeals is the highest Criminal Court in the State of Texas, to have any of their rulings looked into a petitioner must go to the United States Supreme Court. This is especially true with the Texas Court of Criminal Appeals is in direct opposition to any rulings made by the Supreme Court of the United States.

The petitioner has sent a copy of this petition minus the original application (Unable to make copies due to incarceration they should already possess a copy.) to the District Attorney of Ellis County, Texas 40th Judicial District Court of Texas.

STATEMENT OF THE CASE

In August of 2018 petitioner filed his successive petition for writ of habeas corpus (Texas Code of Criminal Procedure 11.07). He brought four grounds for relief: Ineffective assistance of counsel due to not properly investigating the case, not hiring experts, or sharing evidence with the petitioner; false evidence from hearsay witness Linda McMurray; withholding of evidence by the State and a **Schlup** claim of actual innocence based on the first three grounds. (See Appendix 2)

On August 27, 2018 the District Attorney for Ellis County filed their response completely ignoring T.C.C.P. 11.07 sec.4(a)(2) which states: 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. No evidentiary hearing was ordered and on August 31, 2018 the District Judge Signed off on the denial without an investigation fully accepting as fact what the District Attorney's office had to say. (See Appendix 2)

In the original writ filed in August of 2018 petitioner raised the instance of constitutional violations by bringing forth newly available evidence which would have raised serious doubts to the effectiveness of his attorney as well as to the integrity of the conviction. Because of this the 40th Judicial District Court of Texas in Ellis County committed a serious miscarriage of justice.

On page 27, paragraph 1 of the original writ (Appendix 1) first filed in the district court petitioner brought up the fact that the new evidence was paired up with the old evidence to present a claim that had been presented before but are now fully supported with the new evidence. **Schlup v. Delo**, 513 U.S. 798 (1995) shows that this a claim which "does not by itself provide a basis for relief" but is intertwined with constitutional error that resulted in a innocent person being convicted which is a serious miscarriage of justice.

On page 23 paragraph 5 of Appendix 1 it is stated, "Due process clause of the 14th amendment is violated when the States fail to disclose evidence which is favorable to the accused and which creates a reasonable probability that had the evidence been disclosed to the defense the result of the proceeding would have been different, such as to undermine the confidence in the action of the proceeding." **Thomas v. State**, 841 S.W. 2d 399, 404 (Tex.Crim.App. 1992).

Exhibit 7 of Appendix 1 there is a line that Dr. Prescott saw the victim and ruled out sexual abuse. This evidence came to light after petitioner received a copy of his attorney client file from his DNA attorney who had painstakingly copied everything that was included in the DA's file and what he did not copy he made a note of. This information is supported by Exhibit 5 of the Appendix 1 where Mr. Gallo states, "Here's the file."

The third question involves **Martinez v. Ryan**, 132 S.Ct. 1309 (2012) and **Trevino v. Thaler**, 133 S.Ct. 1911 (2013), this was brought to the State Courts attention on Page 30 of Appendix 1. In the Writ petitioner stated that "ineffective assistance claim often depends on evidence outside the trial record, thus there are reasons for delaying consideration of IAC claims until the collateral review stage by doing so the state significantly diminishes the prisoner's ability to file such a claim."

After holding the Texas courts wanted to be able to decide the merits of Trevino's IAC claim yet they will not provide counsel for state writs instead wanting the Federal system to actually foot the bill for such filings. By doing this Texas has severely hamstrung the writ of habeas corpus virtually rendering it null and void.

ARGUMENT

QUESTION NUMBER ONE RESTATED

Did the Texas Court of Criminal Appeals rule adversely by denying Petitioners successive writ of habeas corpus when he presented newly available evidence to the State court in accordance with **Schlup v. Delo**, 115 S.Ct. 851 (1995)? Texas made **Schlup** applicable to the State by codifying **Schlup** in **Texas Code of Criminal Procedure section 11.07 section 4**.

In Texas when a criminal defendant files a successive writ one must meet the requirements of Texas Code of Criminal Procedure 11.07 section 4. The State of Texas did this in response to the Supreme Court's ruling in **Schlup**.

The petitioner must present new evidence to the district court as required. The District Court is to file an answer, which, usually muddies the waters, (The District Attorneys realize that the judges in the courts are very busy and hope that all of the judges involved in the Texas Courts will take the DA's recommendations as factual.) A **Schlup** claim, "does not by itself provide a basis for relief," but it is intertwined with constitutional error that renders a person's conviction invalid.

It is noteworthy that when the Texas Courts were presented with the newly available evidence they only said that they did not think that it was new or that it could have been easily found. (See Appendix 2, in its entirety). But petitioner filed two motions for subpoena duces tecum requesting the holders of the documents to come to court with them and prove to the court the necessity of an evidentiary hearing. Rather the Court accepted what the DA had to say and rubber stamped the order denying relief thereby

denying the petitioner any kind of relief to a legitimate claim from a wrongful conviction.

The law recognizes that the miscarriage of justice exception is implicated when a petitioner can demonstrate actual innocence of the substantive offense for which he was convicted. See **Schlup**, supra. The claim is not in and of itself a ground for habeas relief, but rather it acts as a gateway that allows review of otherwise procedurally defaulted claims.

QUESTION **NUMBER** TWO RESTATED

Did the Texas Court of Criminal Appeals violate the ruling made by the Supreme Court in **Brady v. Maryland**, 373 U.S. 83 (1963) by not remanding and asking the District Court to decide whether or not the prosecution withheld exculpatory evidence?

The Texas state district court did not address the issue but it is an issue. When Petitioners DNA attorney looked through the DA's file he made extensive notes about what he found in there and did not copy. In Exhibit 7 of Appendix 1 on page 4 a Dr. Prescott in December of 1992 ruled out sexual abuse had the petitioner had any idea of this there is absolutely no way that he would have plead guilty. But there are multiple places in the record where the state refers to how they shared all of the medical evidence with petitioner's trial attorney. Yet, there is no way to verify that he saw the Dr. Prescott piece.

This evidence is suppressed, it is favorable to the defense and it was highly material to to his guilt. See **Brady v. Maryland**, 373 U.S. 83 (1963). Brady was clearly violated in this case, but, in order to satisfy AEDPA the violation must be "objectively unreasonable." Because Texas Courts did not explain why the application was rejected the federal will have to hypothesize a reason. "Anything supporting the conclusion that it withheld, favorable evidence was immaterial

in an unreasonable application of Brady's materiality standard." **Floyd v. Conners**, 894 F. 3d 143 (5th Circuit 2018).

QUESTION NUMBER THREE RESTATED

Should **Martinez v. Ryan**, 132 S.Ct. 1309 (2012) and **Trevino v. Thaler**, 133 S.Ct. 1911 (2013) be applicable to the Texas State District Courts in order to stop the flood of federal cases addressing Ineffective Assistance of Counsel cases in Texas?

The Supreme Court opened the door slightly for a showing of cause and prejudice to excuse default in **Martinez v. Ryan**, 132 S.Ct. 1309 (2012) and **Trevino v. Thaler** 133 S.Ct. 1911 (2013). In **Martinez,** the Supreme Court answered a question left open in Coleman; "Whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial." 132 S.Ct. at 1315. These proceedings were referred to as "initial review collateral proceedings." Id. The Court held:

"Where under state law, claims of ineffective assistance of trial counsel must be raised in an initial review, collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance of counsel at trial if, in the initial review collateral proceeding there was no counsel or counsel in that proceeding was ineffective." Id at 1320. The Supreme Court specified that the standard of Strickland apply in assessing whether initial review habeas counsel was ineffective." Id at 1318. In this particular case there was no counsel at all.

The Supreme Court extended **Martinez** to Texas in **Trevino v. Thaler**. Although Texas does not preclude appellants from raising ineffective assistance of trial counsel claims on direct appeal, the court held that the rule in **Martinez** applies because "the Texas procedural system –

as a matter of its structure, design and operation does not offer most defendants a meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal." **Trevino v. Thaler**, 133 S.Ct. at 1921.

This particular case is a prime example of why Trevino is needed to apply at the State level instead of just relying on the Federal courts to have to bear the burden because the Texas courts do not want to. In most cases by the time a defendant is ready to go to the federal level he has lost the ability to provide a viable claim of ineffective assistance because he does not have all of the resources available to him to present a cognizable claim to the courts. It is in effect set up so that most defendants in Texas will never be able to present a claim of ineffectiveness to the Courts to get their convictions overturned due to an incompetent attorney.

Petitioner would at this time ask the court to review this burden it has placed on the state level defendants and make it possible that the Courts at state level have to look at these claims.

PRAYER

WHEREFOR, PREMISES CONSIDERED, Petitioner would ask this court to grant this Petition for Writ of Certiorari and any other relief that the Petitioner needs to obtain a rehearing on these issues.

William A. McIntosh 12-20-18

William Arthur McIntosh, Pro se