

19-8367
No.

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

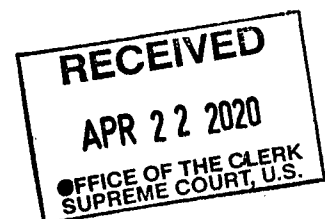
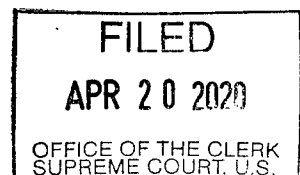
BRANDON COLEMAN - Petitioner

vs.

THE STATE OF TEXAS - Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
TEXAS COURT OF CRIMINAL APPEALS

Brandon Coleman #1874048
Pack Unit
2400 Wallace Pack Rd.
Navasota, Texas 77868



QUESTION PRESENTED

Whether the State of Texas has violated Petitioner's right to Due Process protections under the Fifth & Fourteenth amendments, U.S. Constitution whereas, petitioner has been denied an adjudication of his federal claims on the merits.

LIST OF PARTIES

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

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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.

IV. OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix E to this petition and is unpublished.

VII. JURISDICTION

The date which the highest state court decided my case was February 19, 2020. A copy of that decision appears at Appendix E. The jurisdiction of this court is invoked under 28 USC § 1257(a).

IX. STATEMENT OF THE CASE

Petitioner was arrested on July 15, 2012 and subsequently charged in a five count indictment. When it became apparent to Petitioner that appointed defense counsel would not investigate nor subject the state to any meaningful adversarial test, Petitioner accepted a 20 year, coerced plea agreement on July 29, 2013 under the threat of a life sentence.

Upon incarceration, Petitioner filed a motion for DNA testing under the Texas Code of Criminal Procedure (TCCP) Art. 64.01(b)(2)

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on March 24, 2015. The motion was denied on April 23, 2015 whereas, testing had been performed. As a result, Petitioner received the DNA test results two years after the test results were available to the state. Primarily, Petitioner has maintained his actual innocence throughout, and those test results excluded Petitioner as a contributor, identified others culpable and were withheld from Petitioner until after the plea agreement was obtained by the state.

After receiving the DNA test results, identifying exculpatory, newly available evidence material to Petitioner's conviction, He filed an illadvised, illconceived and imprudent "Out-of-time" appeal application with the Texas Court of Criminal Appeals on November 23, 2015. The court denied the application as time barred without written order. Moreover, Petitioner did not request, nor did the trial court grant permission to Petitioner, the right to appeal after the plea agreement as prescribed in TCCP Art. 44.02.

Petitioner then filed a habeas corpus application under the TCCP Art. 11.07 on February 16, 2016. The Court of Criminal Appeals dismissed the application on April 4, 2016 as successive due to the filing of the "Out-of-time" appeal. This particular improvident ruling sets into motion the violation of procedural Due Process and identifies the conflicting opinions within the Texas Court of Criminal Appeals. Specifically, under Texas law an "Out-of-time" appeal is not considered a collateral attack on the conviction or judgment of guilt under TCCP Art. 11.07.

Most importantly in this instance, Petitioner has been denied an adjudication of his federal claims on the merits in the habeas corpus application.

At every turn, Petitioner has been procedurally barred by the improvident ruling when diligently attempting to resolve as follows. First, Petitioner filed a 28 USC § 2254 federal habeas corpus application on April 27, 2016 which was summarily dismissed as time barred. Second, Petitioner then filed a motion under Fed. R. Civ. Proc. 60(b)(2) due to the denial of a Certificate of Appealability. Next, Petitioner returned to state court and filed another habeas corpus application (11.07) along with accompanying motions and request. Therein, the application pointed out the conflict within the Court of Criminal Appeals to no avail and dismissed as subsequent or successive under TCCP Art. 11.07 Sec. 4 (a). Then, Petitioner filed a motion for authorization in the Fifth Circuit requesting leave to file a subsequent 28 USC § 2254 federal habeas corpus. The motion was denied by the Fifth Circuit.

And finally, Petitioner went back to the state court and filed a habeas corpus application (11.07). This application and memorandum of law detailed the conflicting rulings within the Court of Criminal Appeals including supporting authorities. The court once again dismissed as subsequent under TCCP Art. 11.07 Sec. 4(a), (Appendix E).

To recap, the state proceedings in decending chronological order: the third 11.07 was dismissed as subsequent because, the second 11.07 was dissmised as subsequent because, the first 11.07

was dismissed as subsequent because, the "Out-of-time" appeal was erroneously misconstrued as a collateral attack on the conviction and conflicts with the Texas Court of Criminal Appeals previous decisions.

X. REASONS FOR GRANTING PETITION

This Court should consider granting the petition whereas, the Texas Court of Criminal Appeals, a state court of last resort has decided an important federal question in a way that conflicts with a decision within the Texas Court of Criminal Appeals.

Because Petitioner's initial application seeking an "Out-of-time" appeal did not pertain to the validity of the prosecution or judgment of guilt, it was not a challenge to the conviction invoking the procedural bar of TCCP Art. 11.07 Sec. 4 for subsequent applications.

Procedural Due process claims under the 5th and 14th amendments require a two-part analysis: (1) whether a plaintiff has a liberty interest that is entitled to procedural Due Process protections; and (2) if so, what process is due. Ex parte Robinson, 116 S.w.3d 794, 796 (Tex. Crim app 2003). Petitioner has a liberty interest in challenging the conviction in a collateral proceeding when the DNA test results became available and the discovery was made they were withheld for nearly two years after a coerced plea agreement. In this type of case, the procedure that is due is the state habeas corpus application, TCCP Art. 11.07, and set forth below.

There are four state proceedings that are material to consideration in this present petition. The initial application for "Out-of-time" appeal, and the first, second and third state habeas applications (11.07), directed to correct the conflicting decisions within the Court of Criminal Appeals. At every turn, Petitioner has been procedurally barred due to an unreasonable and improvident determination of his initial application for "Out-of-time" appeal, with a chain of events ensuing that have denied Petitioner Due Process and disposition of His claims therein on the merits, and prejudiced Petitioner to a greater degree than has so far been explained.

As set forth above, Petitioner filed his first habeas application on February 16, 2016. This application was dismissed on April 7, 2016 as successive and procedurally barred under TCCP Art. 11.07 Sec. 4. In order for the first habeas application to be deemed successive, under Texas law, requires the "Out-of-time" appeal to be considered a collateral attack on the prosecution or judgment of guilt. The Court of Criminal Appeals has previously held otherwise that an "Out-of-time" appeal is not a challenge to the conviction.

Primarily, Section 4 restricts a subsequent application that is filed after "an initial application challenging the same conviction." This section applies those restrictions to applications that seek relief from a felony judgment. The initial "out-of-time" application should be admitted to post-conviction procedure "Only" if, under Section 1, it seeks relief from a felony judgment. Ex parte McPherson, 32 S.W.3d 860, 861 (Tex Crim App 2000).

In this instance, Petitioner's initial application for an "Out-of-time" appeal did not directly seek to overturn the conviction. The Court of Criminal Appeals' record demonstrates the "out-of-time" appeal only sought the Court to return petitioner to the point at which he could address the matters regarding DNA test results, discovery of evidence and move the trial court for permission to appeal under Texas Rules of Appellate Procedure (TRAP), Rule 25.2(a)(2). The application therein, does not even identify any grounds for relief that would enable the Court of Criminal Appeals to misconstrue the application as a collateral attack. Additionally, the "Out-of-time" appeal is filed more than two years after the final conviction and time barred itself from consideration.

Since the "Out-of-time" appeal did not pertain to the validity of the prosecution or judgment of guilt, it was not a challenge to the conviction invoking the procedural bar of TCCP Art. 11.07 Sec. 4. Most importantly, the Court of Criminal Appeals should have "dismissed the out-of-time appeal for lack of jurisdiction." Ex parte Torres, 943 S.w.2d 469, 472-74 (Tex Crim App 1997). Therefore, the first habeas corpus application must be considered on the merits. Id.

However, the first habeas corpus application was improperly "dismissed" as successive and procedurally barred. In the Court of Criminal Appeals' jurisprudence, "dismissal" means that the court declined to consider claims for reasons unrelated to merits. Ex parte Torres, supra.

Whereas, an "Out-of-time" appeal is not a challenge to the conviction, and the Court of Criminal Appeals "dismissed" the first habeas application with no disposition of the claims on the merits, the conflict within the Court is revealed. As a result of the conflict, Petitioner filed his second habeas corpus application. This second filing raised the same claims as the first application and identified the conflict therein along with comprehensive facts and argument supporting the above contentions regarding the "Out-of-time" appeal and first habeas application. The Court of Criminal Appeals "dismissed" the claims in the second application as successive and procedurally barred presumably because the first habeas application was adjudicated on the merits and it wasn't.

Since there has been no final disposition by the Court of Criminal Appeals concerning the merits of Petitioner's claims in the first two applications. The legal basis for the third habeas corpus claims were unavailable on the date Petitioner filed the first and second applications. See: TCCP Art. 11.07 Sec. 4(a)(1). Thereby, good cause existed for hearing the third habeas corpus application where the point of error had been previously raised by Petitioner in writ of habeas corpus, but not decided upon by the Court, and is again raised in a subsequent writ such as the case in the third application, Ex parte Barber, 879 S.W.2d 889 (Tex Crim App 1994).

Indeed, due to the absence of a decision on the merits in the first and second applications. The third application's claims did not exist until it was apparent from the dismissal of the

dismissal of the second habeas corpus application, the Court of Criminal Appeals would not correct the point of error regarding the "Out-of-time" appeal erroneous and improvident "denial" on the merits, rather than "dismissal" due to lack of jurisdiction.

Above all, Petitioner is entitled to the process and ruling upon his claims, on the merits as prescribed in TCCP Art. 11.07, see: Ex parte Torres, 943 S.W.2d at 472-74.

The Court of Criminal Appeals has ambiguously applied TCCP Art. 11.07 Sec. 4 to procedurally bar the applications as subsequent thus denying Petitioner his right to Due Process. Most importantly, the state cannot produce a white card "denial" indicating a ruling on the merits-of the first second or third applications for habeas corpus under Art. 11.07. The state can only provide a record of "dismissal" indicating the merits were not considered, Ex parte Torres, 943 S.W.2d at 472.

A federal court generally cannot review the merits of a state prisoner's habeas petition if the claim in the petition is procedurally defaulted, Rocha v Thaler, 625 F.3d 815, 820 (5th Cir 2010). Here, Petitioner can show actual and substantial prejudice because he is precluded from presenting his claims to the federal courts. Petitioner has suffered actual and substantial prejudice because the claims are caught in an ambiguous determination of a procedural ruling by the Court of Criminal Appeals, while the state enjoys the fruits of incarcerating the actually innocent, to wit: Petitioner.

XI. CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Brandon Coleman", written over a horizontal line.

Brandon Coleman #1874048

Date: April 13, 2020