

20-6549
No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

EVATRUS DERJUAN MOSS — PETITIONER
(Your Name)

vs.

LORI DAVIS, DIRECTOR, TDCJ RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

EVATRUS DERJUAN MOSS
(Your Name)

#722174 Polunsky Unit, TDCJ-CID
(Address) 3872 F.M. 350 South

Livingston, Texas 77351
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. DOES A DENIAL OF COUNSEL ON AN INITIAL STATE POST-CONVICTION HABEAS CORPUS APPLICATION, CONTRARY TO THE UNITED STATES SUPREME COURT'S PRECEDENT OF MARTINEZ v. RYAN, 566 U.S. 1, (2012) AND TREVINO v. THALER, 569 U.S. 413 (2013), ACTIVATE THE EXCLUSIONARY PROVISION OF 28 U.S.C. § 2254(d)(1)(B), WHEN THE STATE CREATED IMPEDIMENT CONTINUES TO EXIST?

2. DOES THE FUNDAMENTAL EQUITY PRINCIPLE OF HABEAS CORPUS AFFORD A PERSON PROTECTION OF UNITED STATES SUPREME COURT PRECEDENT AND THE UNITED STATES CONSTITUTION AMENDMENTS OUTSIDE OF THE NORMAL ONE YEAR BAR OF 28 U.S.C. §2254 (d)(1), MORE THAN TWENTY YEARS BEYOND THE FILING DATE DUE TO "PROCEDURAL DEFAULT?"

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:

RELATED CASES

MARTINEZ v. RYAN, 566 U.S. 1 (2012);

TREVINO v. THALER, 569 U.S. 413 (2013).

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TABLE OF AUTHORITIES CITED

CASES

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STATUTES AND RULES

28 U.S.C. §2254 (d)(1)(B)

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OTHER

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 A/B/C 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☒ is unpublished.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 E 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☒ is unpublished.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 H 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 _____ 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.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was JUNE 22, 2020.

☐ 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: JULY 30, 2020, and a copy of the order denying rehearing appears at Appendix B.

☐ 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 JULY 28, 2018.
A copy of that decision appears at Appendix H.

☐ 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

UNITED STATES CONSTITUTION - SIXTH AMENDMENT:

"IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY THE
RIGHT TO ... THE ASSISTANCE OF COUNSEL"

UNITED STATES CONSTITUTION - FOURTEENTH AMENDMENT:

" NO STATE SHALL ... DEPRIVE ANY PERSON OF LIFE, LIBERTY,
... WITHOUT DUE PROCESS OF LAW...."

UNITED STATES CODE:

28 U.S.C. § 2254 (d)(1)(B).

STATEMENT OF THE CASE

MOSS, WHO WAS A 16 YEAR OLD AND CERTIFIED AS AN ADULT, MORE THAN 22 YEARS AGO IN A CAPITAL MURDER CASE, FREELY ACKNOWLEDGES THAT HE IS PROCEDURALLY BARRED FROM FILING A ~~FEDERAL~~ POST-CONVICTION UNDER 28 U.S.C. § 2254(d)(1); EXCEPT, THAT HE FALLS UNDER THE THAT STATUTE'S EXCEPTION PROVISION OF 28 U.S.C. § (d)(1)(B). MOSS DID REQUEST COUNSEL IN HIS STATE-LEVEL HABEAS APPLICATION IN ORDER TO PROSECUTE HIS INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIM. MOSS HAS VERIFIABLE JUVENILE STATE LAW VIOLATIONS AND VIOLATION OF CONTROLLING STATE CASE LAW THAT ARE IN HIS FAVOR THAT TRIAL COUNSEL COMPLETELY FAILED TO RECOGNIZE OR RAISE. AS THIS COURT RECOGNIZED IN TREVINO, TEXAS CREATED A STATE PROCEDURAL IMPEDIMENT OF NOT ALLOWING INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIMS TO BE RAISED ON DIRECT APPEAL. BOTH MARTINEZ AND TREVINO WERE PREVAILING FEDERAL LAW AS DETERMINED BY THIS COURT WHEN MOSS FILED HIS INITIAL STATE-LEVEL POST-CONVICTION APPLICATION FOR WRIT OF HABEAS CORPUS, WHICH HAS NO TIME LIMITATION FOR FILING, AND HIS FEDERAL PETITION. TREVINO CONTROLS AS THE STATE IMPEDIMENT EXISTS TO THIS DAY, ALBEIT WITH LIP SERVICE FROM THE STATE'S HIGHEST COURT OF CRIMINAL APPEALS THAT A COURT WILL APPOINT COUNSEL WHEN IT DECIDES IT IS NECESSARY, CONTRA TO THE HOLDING OF TREVINO. See: EX PARTE GARCIA, 485 S.W.3d 565 (Tex. Crim. App. 2016).

REASONS FOR GRANTING THE PETITION

1. TEXAS COURTS WILL NOT APPLY THE HOLDING OF TREVINO WITHOUT A DIRECT ORDER IN THE FORM OF A DECISION BY THIS COURT. AS THE SECOND LARGEST STATE WITH THE LARGEST PENAL SYSTEM IN THE UNITED STATES, THE RELIEF AFFORDED WILL EFFECT ITS CITIZENS NOW AND IN THE FUTURE.

2. THIS CASE WILL AFFORD THE COURT THE OPPORTUNITY TO MAKE CLEAR TO ALL THE CIRCUITS THE LIMITATIONAL EFFECTS 28 U.S.C. § 2254 (D)(1) AS WELL AS THE STATUTE'S EXCLUSIONARY REQUIREMENTS.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Evatrús D. Moss
EVATRÚS DERJUAN MOSS

Date: OCTOBER 15, 2020

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-20484

EVATRUS DERJUAN MOSS,

Applicant,

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

Application for a Certificate of Appealability
from the United States District Court
for the Southern District of Texas

Before HIGGINBOTHAM, SMITH, and OLDHAM, Circuit Judges.

PER CURIAM:

A member of this panel previously denied Moss's application for a certificate of appealability. In his motion for reconsideration, Moss argues that (1) he properly raised an argument based on *Floyd v. Vannoy*, 894 F.3d 143 (5th Cir. 2018), and (2) he is entitled to a COA based on that *Floyd* argument. Even assuming Moss properly raised an argument based on *Floyd*, it is unavailing. *Floyd* held that a state habeas petitioner had sufficiently demonstrated his actual innocence based on "newly-discovered evidence" and thus could "overcome the untimeliness of his habeas application." *Id.* at 160.

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But Moss has pointed to no such evidence and made no such actual-innocence claim. *Floyd* is thus irrelevant here. IT IS THEREFORE ORDERED that the COA application is DENIED.