Cause No. 14-CR-2877-83-2

EX PARTE	§	**IN THE DISTRICT COURT OF**
	§	**GALVESTON COUNTY, TEXAS**
JOSEPH BOURGEOIS	§	**56th JUDICIAL DISTRICT**

STATE'S ANSWER TO APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS

The State of Texas, by and through the Criminal District Attorney for Galveston County, Texas, files this answer in response to the habeas application filed by Applicant on April 13, 2021.

1. Procedural history

In Cause No. 14-CR-2877, Applicant was charged by indictment with the offense of intoxication manslaughter. In Cause No. 15-CR-1476, he was charged by indictment with the offenses of intoxication assault (Count I) and aggravated assault (Count II). On January 25, 2016, Applicant entered negotiated pleas of guilty to the charges of intoxication manslaughter in Cause No. 14-CR-2877 and intoxication assault in Cause No. 15-CR-1476. The charge of aggravated assault (Count II in Cause No. 15-CR-1476) was dismissed. On that same date, the trial court, in each case, entered a deadly weapon finding and sentenced Applicant to imprisonment for a term of 15 years.

On April 13, 2021, Applicant filed the instant habeas application, which is a subsequent application. The instant application challenges Applicant's conviction for intoxication manslaughter in Cause No. 14-CR-2877. This application does not purport to challenge the conviction for intoxication assault in Cause No. 15-CR-1476.

2. General denial

The State generally denies each and every allegation in Applicant's habeas application.

3. Applicant's claims are barred by Section 4

Consideration of the claims in Applicant's subsequent habeas application is barred by Section 4 of Article 11.07. *See* TEX. CODE CRIM. PROC. art. 11.07, § 4(a). The legislative intent underlying Section 4 was to limit a person filing a habeas application under Article 11.07 to "one bite at the apple." *Ex parte Torres*, 943 S.W.2d 469, 474 (Tex. Crim. App. 1997). Section 4 provides, *inter alia*, as follows:

> Sec. 4. (a) If a subsequent application for writ of habeas corpus is filed after final disposition of an initial application challenging the same conviction, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:
> (1) the current claims and issues have not been and could not have been presented previously in an original application or in a previously considered application filed under this article because

> the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application; or
> (2) 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.

TEX. CODE CRIM. PROC. art. 11.07, § 4(a).

Thus, unless the subsequent habeas application establishes the applicability of an exception, Section 4 bars consideration of that application "after final disposition of an initial application challenging the same conviction." TEX. CODE CRIM. PROC. art. 11.07, § 4(a). A "final disposition" of an initial writ is one that "entail[s] a disposition relating to the merits of all the claims raised." *Torres*, 943 S.W.2d at 474.

Here, the Court's file reflects that Applicant filed his initial post-conviction habeas application, in Cause No. 14CR2877-83-1, on July 8, 2016. That application asserted multiple claims of ineffective assistance of counsel as well as a claim of actual innocence. On September 21, 2016, the initial application was denied by the Court of Criminal Appeals without written order. The denial of that initial application signifies that the Court of Criminal Appeals considered and rejected the merits of the claims asserted therein. *See Torres*, 943 S.W.2d at 472 ("In our writ jurisprudence, a 'denial' signifies that we addressed and rejected the merits of a particular claim while a 'dismissal' means that we declined to consider the claim for reasons unrelated to the claim's merits.").

The instant habeas application does not contain specific facts sufficient to establish that the current claims could not have been presented previously because the factual or legal basis for the claim was unavailable when the earlier application was filed. *See* TEX. CODE CRIM. PROC. art. 11.07, § 4(a)(1). Nor does the instant application contain specific facts sufficient to establish, by a preponderance of the ← HERE evidence, that no rational juror could have found the applicant guilty beyond a reasonable doubt. *See id.*, art. 11.07, § 4(a)(2).

All five of the grounds in the instant habeas application purport to assert claims of unreasonable search and/or seizure. Applicant suggests that the legal basis underlying those claims was unavailable during his initial habeas proceeding and that those claims therefore could not have been presented in his initial application. *See* Appl. 4 (citing *Reyes-Requena v. United States*, 243 F. 3d 893 (5th Cir. 2002)). However, Applicant's contention lacks merit. It is readily apparent that the prohibition against unreasonable searches and seizures was in place long before ← HERE the denial of the initial habeas application. *See, e.g.*, U.S. CONST., Amend. IV.

Applicant appears to argue, in his fifth ground, that article 42.12, section 3g has been repealed and that he was therefore convicted of "a nonexistent crime." Appl. at 15; *see* former TEX. CODE CRIM. PROC. art. 42.12, § 3g (captioned ← HERE "Limitation on Judge Ordered Community Supervision"). However, that argument lacks merit for the simple reason that the statute has simply been re-codified as

Texas Code of Criminal Procedure article 42A.054. *See* Act of June 17, 2015, 84th Leg., R.S., ch. 770, § 1.01, 2015 Tex. Gen. Laws 2321, 2321–65; TEX. CODE CRIM. PROC. Art. 42A.054 (captioned "Limitation on Judge Ordered Community Supervision"). This non-substantive change in the statutory scheme has no bearing on the question of whether Applicant's claims are barred by Section 4.

4. Applicant's claims are not cognizable because they could have been raised on direct appeal

If this Court reaches the merits of the claims asserted in the instant habeas application, the court should find that none of those grounds is cognizable. *See Ex parte Aubin*, 537 S.W.3d 39, 42 n.3 (Tex. Crim. App. 2017) ("Because cognizability is a merits question for the purpose of § 4, we must consider the § 4 bar before considering a cognizability question.").

Habeas corpus is an extraordinary remedy and is available only when there is no other adequate remedy at law. *Ex parte Cruzata*, 220 S.W.3d 518, 520 (Tex. Crim. App. 2007). Consequently, habeas corpus may not be used to assert claims that could have been asserted on direct appeal. *Id.*; *see Ex Parte McGowen*, 645 S.W.2d 286, 288 (Tex. Crim. App. 1983) ("The purpose of a writ of habeas corpus is to determine the lawfulness of confinement; it is not a substitute for appeal."). In particular, a claim challenging the legality of a search or seizure is forfeited by the applicant's failure to raise that claim on direct appeal. *Ex parte Grigsby*, 137 S.W.3d 673, 674 (Tex. Crim. App. 2004).

In the instant proceeding, Applicant's habeas application sets forth five grounds, each of which purports to assert a claim of unreasonable search or seizure. *See* Appl. 6-15. Each such claim could have been raised at the trial level and then, if rejected by the trial court, asserted on direct appeal. However, because Applicant did not pursue a direct appeal, none of those claims is cognizable here. *See Grigsby*, 137 S.W.3d 673, 674.

5. There is no need to expand the record in this case

The record before this Court is sufficient to enable the Court to resolve this matter. Thus, there is no need for the Court to issue any order designating issues of fact or for the Court to convene any fact-finding hearing.

PRAYER

WHEREFORE, the State prays that this Court find that there are no controverted, previously unresolved issues of fact material to the disposition of Applicant's habeas application; that all of Applicant's claims are barred by Texas Code of Criminal Procedure article 11.07, section 4; and that none of Applicant's claims is cognizable because each such claim could have been raised on direct appeal. The State prays, further, that the Court recommend to the Texas Court of Criminal Appeals that the instant habeas application be dismissed.

Respectfully submitted,

JACK ROADY
Criminal District Attorney

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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 73.3, I hereby certify, based on the computer program used to generate this document, that this document contains 1,324 words.

/s/ M. Scott Taliaferro
M. SCOTT TALIAFERRO

CERTIFICATE OF SERVICE

I hereby certify that, on this 28th day of April, 2021, a copy of this Answer to Application for Post-conviction Writ of Habeas Corpus was served on Applicant by e-file service or by sending via certified mail a true and correct copy of this instrument to Applicant at the following address:

Joseph Bourgeois
TDCJ #02048808
Beauford H. Jester III Unit
3 Jester Road
Richmond, TX 77406

/s/ M. Scott Taliaferro
M. SCOTT TALIAFERRO

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JOSEPH BOURGEOIS	§	**56th JUDICIAL DISTRICT**

FINDINGS OF FACT, CONCLUSIONS OF LAW, RECOMMENDATION, AND ORDER TO TRANSMIT HABEAS CORPUS RECORD (POST CONVICTION APPLICATION)

ON THIS _____ day of _____, _____, came on to be considered the application for writ of habeas corpus in the above cause. The Court makes the following findings of fact and conclusions of law:

1. There are no controverted, previously unresolved issues of fact that are material to the disposition of Applicant's application for writ of habeas corpus.
2. The instant habeas application is a subsequent application. All of the claims asserted in that application are barred by Texas Code of Criminal Procedure article 11.07, section 4.
3. None of the claims in Applicant's habeas application is cognizable because each such claim could have been raised on direct appeal.

On the basis of the foregoing finding and conclusions, this Court recommends to the Texas Court of Criminal Appeals that Applicant's application be **DISMISSED**.

The Court hereby **ORDERS** that the District Clerk of Galveston County prepare and transmit the record herein to the Texas Court of Criminal Appeals.

_____
JUDGE PRESIDING

John D. Kinard
DISTRICT CLERK
GALVESTON COUNTY, TEXAS

Galveston Office
600 59th Street, RM 4409
Galveston, TX 77551-2388
Phone(409)766-2424
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Joseph Montrel Bourgeois TDC# 2048808
Jester III Unit
3 Jester Road
Richmond, Texas 77406

6/3/2021

IN RE: **JOSEPH JR BOURGEOIS**
Cause Number **14-CR-2877-83-2**

Dear **JOSEPH JR BOURGEOIS**

Please find a copy of the notification to this office that the court of criminal appeals of the state of Texas has **dismissed** without written order your application for writ of habeas corpus.

Sincerely,

John D. Kinard
District Clerk
Galveston, County, Texas

Terrie Kahla

By: Terrie Kahla, Deputy

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

FILE COPY

6/2/2021

BOURGEOIS, JOSEPH MONTREL Tr. Ct. No. 14-CR-2877-83-2 WR-85,655-03

The Court has dismissed without written order this subsequent application for a writ of habeas corpus. TEX. CODE CRIM. PROC. Art. 11.07, Sec. 4(a)-(c).

Deana Williamson, Clerk

JOSEPH MONTREL BOURGEOIS
JESTER III UNIT - TDC # 2048808
3 JESTER ROAD
RICHMOND, TX 77406

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS FILE COPY
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

6/2/2021
BOURGEOIS, JOSEPH MONTREL Tr. Ct. No. 14-CR-2877-83-2 WR-85,655-03
The Court has dismissed without written order this subsequent application for a writ of habeas corpus. TEX. CODE CRIM. PROC. Art. 11.07, Sec. 4(a)-(c).

Deana Williamson, Clerk

DISTRICT CLERK GALVESTON COUNTY
JOHN KINARD
600 59TH ST. SUITE 4001
GALVESTON, TX 77551
* DELIVERED VIA E-MAIL *

2021 JUN -3 AM 8:15
FILED

14-CR-2877-83-2
DCCOFCA
Correspondence from Court of Appeal
2209716