No. 22-7671

In the Supreme Court of the United States

Eduardo Catarino Palacios
Petitioner

v.

The State of Texas

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Submitted by:

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QUESTION PRESENTED

(As set out in the Certiorari Petition)

Question 1. Is the Prosecutor allowed to override a Habeas Courts findings of fact and conclusions of law.

Question 2. Is the Prosecutor allowed to use Art. 11.07 Sec. 4 as a means to deny a corrected 11.07 that is only being resubmitted due to prior 11.07 being dismissed for non-compliance.

Question 3. If the CCA dismisses a 11.07 for non-compliance is there any law or policy or procedure that prohibits one from filing a corrected Application of habeas corpus.

Question 4. Is a Habeas Corpus that was dismissed for non-compliance with Texas Rules of Appellate Procedure 73.1 cause a bar for a corrected 11.07 under rule 11.07 section 4.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases:

Federal Statutes:

Texas Cases:

Texas Statutes / Codes:

INTRODUCTION

Procedural History

Petitioner Palacios was charged with murder along with a co-defendant, Omar "Homer" Escobedo. The two were seen by the police fleeing from the crime scene, exchanging an object with each other near where the murder weapon and another gun was found. Both defendants had gunshot residue on their hands. An eyewitness, Patricia "Tricia" Salazar, gave a tape-recorded statement to the police, which was summarized in writing. The tape was then lost, and Salazar left the state, never to return, despite enormous efforts by the defense and prosecution to find her.

Escobedo entered into a plea agreement and testified against the Petitioner, who was convicted and sentenced to 50 years to serve and a $10,000 fine. Petitioner was sentenced on February 7, 2003. Petitioner appealed to the Texas Fourth (San Antonio) Court of Appeals. His conviction was affirmed on November 10, 2004, in case number 04-03-00200-CR.[1]

[1] Information relevant to the appeal is located in the Court of Appeals' on-line docket sheet.

Thereafter, on February 5, 2005, Petitioner sought discretionary review by the Court of Criminal Appeals of Texas. Review was refused in case number PD-0187-05 on April 13, 2005.

Petitioner filed his initial (case number WR-65,150-01) state *habeas corpus* application under Article 11.07, C.Cr.P., on May 2, 2006. Relief was denied without written Order on August 16, 2006.[2] A copy of the writ application is in the record provided by the Court of Criminal Appeals of Texas ("CCA") at pages 164-196.

Petitioner filed a federal *habeas corpus* application under 28 USC 2254 in the United States District Court for the Laredo Division of the Southern District of Texas (case number 5:06-cv-00151) on October 24, 2006.[3] On July 2, 2008, the United States Magistrate Judge issued her Report and Recommendation[4] in case number L-06-151, recommending that relief be denied. On September 12,

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[2] Information relevant to Petitioner's initial ("-01") *habeas corpus* application is located in the Court of Criminal Appeals on-line docket sheet for case number WR-65,150-01.

[3] A copy of the 2554 application is in the CCA record at pages 197-208.

[4] See CCA record at pages 209-232.

2008, the District Court Ordered that the Respondent's motion for summary judgment be granted and the case dismissed.[5]

Petitioner filed an appeal of the denied federal writ to the Fifth Circuit in case number 08-41043. The Circuit Court affirmed the District Court's holding on June 24, 2010.[6]

Petitioner filed a first subsequent Article 11.07 ("-02") state writ application, restating the grounds from the -01 application, and adding a new claim that trial counsel was ineffective for not attempting to admit Salazar's written statements under the rule of optional completeness (Rule 107, Texas Rules of Evidence). That application was received at the CCA on May 13, 2022. On May 18, 2022, it was dismissed without written Order for non-compliance with the rules.[7]

Petitioner filed a second subsequent Article 11.07 ("-03") state writ application, which was virtually identical with his -02 application, although no longer non-compliant. That application was received at the CCA on July 12,

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[5] See CCA record at pages 233-235.

[6] See CCA record at pages 237-240. The undersigned was informed, that Petitioner subsequently sought leave to file an untimely certiorari petition, but the effort was unsuccessful.

[7] Information relevant to Petitioner's first subsequent ("-02") *habeas corpus* application is located in the Court of Criminal Appeals on-line docket sheet for case number WR-65,150-02.

2022. On July 27, 2022, it was dismissed pursuant to Article 11.07 section 4, C.Cr.P.[8] Petitioner filed a "Motion for Extension of Time to File Motion to Reinstate And/or Motion for Suggestion of Reconsideration" on August 15, 2022. The CCA took no action on that motion. Petitioner filed a second motion, this one styled "Motion to Reinstate and/or Motion for Suggestion of Reconsideration" on September 13, 2022. The CCA treated this motion as a "suggestion that it reconsider it dismissal "on the courts own motion." The CCA denied the suggestion on September 20, 2022.

Slightly more that three months later, on Januar 3, 2023, Petitioner filed his third subsequent Article 11.07 ("-04") state writ application, which, like his -03 application, was virtually identical with his -02 application. The application was received at the CCA on February 14, 2023. On March 1, 2023, it was dismissed pursuant to Article 11.07 section 4, C.Cr.P.[9]

Petitioner's certiorari petition was filed on May 24, 2023. The Court requested a response on August 3, 2023. This response is due September 5, 2023.

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[8] Information relevant to Petitioner's first subsequent ("-03") *habeas corpus* application is located in the Court of Criminal Appeals on-line docket sheet for case number WR-65,150-03.

[9] Information relevant to Petitioner's first subsequent ("-04") *habeas corpus* application is located in the Court of Criminal Appeals on-line docket sheet for case number WR-65,150-04.

REASONS TO DENY THE PETITION

I. Timeliness

As Petitioner sets out in his "Related Proceedings" section, "Petitioner's Attorney corrected and resubmitted under application submitted 6/9/2022. Only to be dismissed under Sec. 4. on 7/27/2022." Petitioner next noted that "Petitioner's attorney filed a motion for reconsider only to be Denied."

Petitioner's initial *habeas* application, the 01, was considered and denied on its merits. Admittedly, Petitioner's -02 *habeas* application was not rejected on the merits, but for non-compliance with the relevant state rules. His -03 application, was dismissed under Article 11.07, as he indicated and as set out above, was denied on July 27, 2022, and the suggestion that the CCA should reconsider the dismissal was denied on September 20, 2022.

Pursuant to Rule 13, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort is timely when it is filed with the Clerk of the Court "within 90 days after entry of the judgment." If such time period began when Petitioner's -03 application was dismissed, the certiorari petition was due for filing not later than October 25, 2022. Even if one presumes the Rule 13 time period began when the

reconsideration suggestion was denied, a certiorari petition would have been due not later than December 19, 2022. Consequently, as the claims in Petitioner's -04 *habeas* application and the certiorari petition based on that case are identical, Petitioner's claims have been procedurally defaulted. In essence, Petitioner's claims could have been brought to this court previously but were not and they cannot be heard now. See ***Sunal v. Large***, 332 U.S. 174 (1947).

II. Independent State Grounds

The adequate and independent state grounds doctrine is the product of two fundamental features of this Court's jurisdiction.

> First, this Court is powerless to revise a state court's interpretation of its own law. Murdock v. Memphis, 20 Wall. 590, 636 (1875). We thus cannot disturb state-court rulings on state-law questions that are independent of federal law. Second, Article III empowers federal courts to render judgments, not advisory opinions. Hayburn's Case, 2 Dall. 409 (1792). So if an independent state ground of decision is adequate to sustain the judgment, we lack jurisdiction over the entire dispute. Anything we said about alternative federal grounds would not affect the ultimate resolution of the case and would therefore be advisory. Herb v. Pitcairn, 324 U.S. 117, 126 (1945).

Cruz v. Arizona, 598 U.S. _____ (No. 21-846; February 22, 2023). The State asserts that the CCA's application of Article 11.07 section 4, C.Cr.P., is adequate to support that Court's judgment. That code section reads 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.

(b) For purposes of Subsection (a)(1), a legal basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the legal basis was not recognized by and could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date.

(c) For purposes of Subsection (a)(1), a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date.

The CCA's application of Article 11.07 section 4 under Subsection (a)(1) is supported by the fact that the existence of the now missing recording was known to Petitioner's lawyer before trial. As set out in Petitioner's -03 application, submitted on December 27, 2022.[10]

> The referenced audio recording was known to counsel prior to trial and counsel failed to request a copy of the recording. Trial counsel had a duty to request material that was obviously favorable in both the guilt/innocence phase of trial and in mitigation at sentencing.

CCA Record, page 63.

Petitioner first raised claims of suppression of the recording/tape and ineffective assistance in his May 2006 ("-01") state *habeas* application,[11] his October 2006 28 U.S.C. 2254 application,[12] and his April 2020 ("-02") state *habeas* application.[13] A comparison of the grounds raised in Applicant's -01 and -02 applications is in order.

A comparison of the first ground in Petitioner's -01 application and the third ground in his -02 application reveals that they are substantially the same claim. The -01 application claimed there had been an "unconstitutional

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[10] See CCA record, page 72.

[11] See CCA record, pages 164-175.

[12] See CCA record, pages 197-208.

[13] See CCA record, pages 176-196.

suppression of exculpatory evidence, because "The prosecution suppressed the statements of eye-witness Patricia Salazar, which contained exculpatory evidence favorable to Applicant." Similarly, the -03 application, which claimed a due process violation, alleged that "[t]he prosecution suppressed the statements of eye-witness Patricia Salazar, which contained exculpatory evidence favorable to Applicant."

In his -01 application, Petitioner claimed to have been denied the effective assistance of counsel because "[t]rial Counsel, Oscar J. Pena, failed to object to the unconstitutional suppression of exculpatory evidence pursuant to Brady." The -02 application claimed, almost identically, that:

> 1. Eduardo Catarino Palacios {"Palacios") is being unjustly detained by action of the Texas Department of Criminal Jus~ce, in violation of his Constitutional Due Process Right and his right to effective assistance of legal counsel. Palacios was not afforded effective assistance of counsel in that counsel failed to request and/or discover an audio tape recording of an eyewitness to the offense for which Palacios was convicted which was favorable and material to Palacios in that it was both exculpatory and· impeachment evidence
>
> 2. Eduardo Catarina Palacios ("Palacios") is being unjustly detained by action of the Texas Department of Criminal Justice. in violation of his Constitutional Due Process Right and his right to effective assistance of legal counsel. Palacios was not afforded effective assistance of counsel in that counsel failed to properly have inttoduced info evidence both a written statement arid audio tape recording of an eyewitness to the offense for which Palacios was convicted which were favorable and material to Palacios in that they were both exculpatory and impeachment evidence.

See CCA Record, pages 183-187.

While the CCA dismissed the -03 state *habeas* application without a written order, its docket notation made clear that it was being dismissed pursuant to Article 11.07 section 4.[14] Additionally, as Petitioner has indicated, "Petitioner had resubmitted the corrected Application and complied with Texas Rules of Appellate Procedure 79.2(d) which does not violate said rules."[15] What is also clear is that, regardless of whether one considers the -02 or -03 writ applications, the Court's action in dismissing the -03 application under Article 11.07 section 4 was fully justified, as the facts giving rise to thhe claims raised in those applications were known to Petitioner at the time he filed the -01 application **and** could have been included in that Application. See ***Ex parte Barbee***, 616 S.W.3d 836 (Tex.Cr.App. 2021)(finding a claim barred under Texas law by Article 11.07 section 4 because the theory employed was a "logical extension" of a claim that existed and was available at the time the initial *habeas* application was filed); see also ***Ex parte Sledge***, 391 S.W.3d 104, 106 (Tex.Cr.App. 2013)(a claim not raised in the initial *habeas* application was barred by Article 11.07 section 4;

[14] See the CCA's on-line docket sheet for case number WR-65,150-03: "07/27/2022 ACTION TAKEN Dismissed -- See Art. 11.07, Sec. 4."

[15] See certiorari petition page ii.

"While we are not unsympathetic to the applicant's claim, this Court lacks the authority to grant him relief").

Finally, if a Texas post-conviction *habeas* applicant submits a subsequent writ application which contains nothing different from his previously rejected initial post-conviction *habeas* application, that application would be in and of itself barred under Texas law because the application contained only matters that had been previously raised and rejected. Petitioner's "-04" *habeas* application, which is the case actually before the Court, is in that precise situation. It was in and of itself barred under Texas law because the application Petitioner submitted contained nothing different than his already rejected "-03" *habeas* application.

III. The Trial Court's Findings Are Not Supported by the Record

Finally, even if one overlooks the fact that the claims in the -02 writ application were raised and rejected in the -01 writ litigation in both state and federal court, the trial court's findings pertaining to whether Applicant's -02 application was barred by Article. 11.07 section 4 are not supported by the record. In its findings and conclusions as to that issue, the trial court found:

> 3. A successive petition is not permitted unless the Applicant establishes 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 Crime Proc Ann. Art. 11 .07, Sec.4.

4. The Court concludes that the Applicant has satisfied his burden of demonstrating by a preponderance of the evidence, that, 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. Ann. Art, 11.07, Sec. 4(a)(2).

5. In sum, the Court finds that Applicant has met his burden for the reasons stated. Consequently, this subsequent writ is properly before the Court under Article 11.07, Section 4(a)(2). See Schiup v. Delo. 513 U.S. 298 (1995).

In classic terminology, the trial court's findings are not supported by the *habeas* record. More specifically, there are three problems with these findings.

First, they are not supported by the pleadings and/or the factual allegations in the pleadings or supporting document. Petitioner never claimed to have been innocent, never invoked ***Schlup v. Delo***, 513 U.S. 298 (1995), and never claimed that he would have been found not guilty had the missing tape recording been available at trial.

Second, the required factual basis to find an exception to Article 11.07 section 4 is for there to be a "constitutional violation." The alleged constitutional violation having been the State's suppression of the tape record was specifically rejected in the -01 litigation by both the state and federal court and that rejection is, therefore *res judicata* under Texas law. ***York v. State***, 342 S.W.3d 528 (Tex.Cr.App. 2011).

Third, none of the evidence introduced in the evidentiary hearing would support the idea that "no rational juror could have found the Applicant guilty beyond a reasonable doubt." Viewed in the light most favorable to the trial court's findings, the evidence might have made the State's case at trial seem weaker. Not weak enough, however, for a court to determined that, with that evidence, "no rational juror could have found the Applicant guilty beyond a reasonable doubt."

CONCLUSION

By failing to seek certiorari review when his -03 *habeas* application was dismissed under Article 11.07 section 4, Petitioner procedurally defaulted the claims made in the certiorari petition. Filing and having had rejected his -04 writ cannot be said to have resurrected his claims. Moreover, the CCA's dismissal of

the -03 and -04 writ applications under Article 11.07 section 4 is an independent state ground which is adequate to support that the CCA's actions. Finally, the trial court's findings and conclusions are not supported by the record forwarded by the CCA. For these reasons, there is no reason for the Court to be interested in this petition. It should be dismissed as untimely or denied on the merits.

Respectfully submitted,

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