No. 23-6924

FILED
JAN 26 2024
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

Leonard Farrell Willis — PETITIONER
(Your Name)

vs.

Bobby Lumpkin,
Director, TDCJ-CID — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

Leonard Farrell Willis
(Your Name)

John M. Wynne State Farm
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(Address)

Huntsville, Texas. 77349-0005
(City, State, Zip Code)

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QUESTION(S) PRESENTED

QUESTION No. 1: Does a federal habeas petitoner's claim of actual innocence of a non-capital sentence exception operate, in the wake of McQuiggin v. Perkins, 133 S.Ct. 1924 (2013), to surmont both procedural bars and 1-year limintation period when several Circuit Court of Appeals have held that McQuiggin does not apply apply to habeas claims based on actual innocence of a sentencing error. United States v. Jones, 758 F.3d 579 (4th Cir. 2014).

QUESTION No. 2: Whether the Court of Appeals should have issued a Certificate of Appealability from the district court's determination that the Petitioner's claim of actual innocence sentencing error was unexhausted and procedurally barred, when such an exception is a creature of federal law not subject to the rules of exhaustion and procedural default.

QUESTION No. 3: Whether the Court of Appeals should have issued a Certificate of Appealability from the district court's determination of the case without considering and addressing the Petitioner's claim of actual innocence in sentencing error when Circuit precedent and several Circuit Appellate Courts have extended the actual innocence exception to non-capital sentencing proceedings. Haley v. Cockrell, 306 F.3d 257 (5th Cir. 2002), U.S. v. Mikalajunas, 186 F.3d 490 (4th Cir. 1999), and Spence v. Meadow Correctional Facility, 219 F.3d 162 (2nd Cir. 2000).

QUESTION No. 4: Whether the Court of Appeals should have issued a Certificate of Appealability to determine whether the district court's determination that several of the Petitioner's claims were exhausted when a new State legal decision provides that the claims were not exhausted; and not adjudicated on the merits so that the district court's assessment of the claims under Title 28 U.S.C., Section 2254(d)(1) and (2) was erroneous or a clear error in law.

In context thereof, a reasonable jurist would find it debatable as to whether the court of appeals should have issued a Certificate of Appealability.

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: Ken Paxton, Attorney General, State of Texas, P.O. Box 12548, Austin, Texas. 78711-2548

RELATED CASES

1. Leonard Farrell Willis v. The State of Texas, No. #14-17-00559-CR, 2019 Tex.App.LEXIS 3447 (Tex.App. 14th Dist. Apr. 30, 2019).
2. In Re Leonard Farrell Willis, No. #PD-0514-19, 2019 Tex.Crim.App LEXIS 845 (Tex.Cr.App. Aug. 21, 2019).
3. Ex Parte Leonard Farrell Willis, No. #WR-72,712-04, (Tex.Cr.App. Dec. 08, 2021).

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TABLE OF AUTHORITIES CITED

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 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 B 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 _____ 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 November 01, 2023.

[ ] 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: November 28, 2023, and a copy of the order denying rehearing appears at Appendix C.

[ ] 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 _____. A copy of that decision appears at Appendix _____.

[ ] 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

Title 28 U.S.C., Section 2253(c)(1)(A): Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from - (A) the final order in a habeas corpus proceeding in which the deterniton complained of arises out of process issued by a State court...

Title 28 U.C., Section 1153(c)(2): A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

Title 28 U.S.C., Section 2244(d)(1)(D): A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of- (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

United States Constitution; 6TH Amendment: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be iformed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Texas Code of Criminal Procedure; Article 11.07, Section 3(b): An application for writ of habeas corpus filed after final conviction in a felony case, other than a case in which the death penalty is imposed, must be filed with the clerk of the court in which the conviction being challenged was obtained, and the clerk shall assign the application to that court. When the application is received by that court, a writ of habeas corpus, returnable to the Court of Criminal Appeals, shall issue by operation of law.

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STATEMENT OF THE CASE

This is a federal habeas proceeding initiated by the Petitioner under the provisions of Title 28 U.S.C., Section 2254 et seq., and before the United States District Court for The Southern District of Texas, Galveston Division. (Appendix B).

Petitioner was convicted on June 16, 2017, for the alleged offense of Sexual Assault, before the 405TH Judicial District Court of Galveston County, Texas, in Case No. #15-CR-1465, Styled: The State of Texas v. Leonard Farrell Willis. Punishment was assessed at forty (40) years confinement in the Texas Department of Criminal Justice-Correctional Institutions Division. On April 30, 2019, the Fourteenth Court of Appeals for The State of Texas affirmed the Judgment & Sentence of Conviction, in Case No. #04-14-00559-CR, Styled: Leonard Farrell Willis v. The State of Texas. On August 21, 2019, Petitioner's Petition for Discretionary Review was refused by the Texas Court of Criminal Appeals in Case No. #PD-0514-19, Styled: In re Leonard Farrell Willis. No Petition for Writ of Certiorari was sought with the United States Supreme Court.

On November 18, 2020, an attorney filed a State application for habeas corpus relief, directed to the 405TH Judicial District Court of Galveston County, Texas. The application was filed in the 122ND Judicial District Court of Galveston County, Texas, and was docketed as Case No. #15-CR-1465-83-1. The attorney specifically specifically informed the Petitioner that he was not representing him on the matter, and that he would have to file an Amended

Application, because the instant application was filed in view of the 1-year limitation period under federal law.

On November 26, 2020, Petitioner placed in the prison mail box for filing an Amended State habeas application, however, the application seeminly did not reach the District Clerk's Office of Galveston County, Texas. On December 07, 2020, Petitioner filed another Amended State habeas application directed to the 405TH Judicial District Court of Galveston County, Texas, that was docketed with the 122ND Judicial District Court of Galvestion County, Texas, in Case No. #CR-15-1465-83-2, that was forwarded to the Texas Court of Criminal Appeals on July, 01,2021, and was filed with that court. There is no Order by the Texas Court of Criminal Appeals disposing of the application.

The district court alluded to the State habeas application filed on December 07, 2020, as a Supplemental pro se application, which Petitioner later moved to dismiss, and on June 18, 2021, the trial court issued additional findings of fact and conclusions of law dismissing Petitioner's supplemental application on his motion.

On December 08, 2021, the Texas Court of Criminal Appeals denied Petitioner's State habeas application without written order on the findings of the trial court without a hearing and on the court's independent review of the record, in Case No. #WR-72,712-04, Styled: Ex Parte Leonard Farrell Willis.

During, the State habeas proceeding, Petitioner objected to the jurisdiction of the 122ND Judicial District Court of Galveston

County, Texas, to consider and address the claim or claims presented in the application because it was not the convicting court. However, the issue was not considered and addressed by the State habeas court.

Petitioner filed a federal habeas petition on December 07, 2020, and on April 26, 2021, on the Respondent's motion entered a stay of the federal proceeding pending the completion of the Petitioner's State habeas proceedings. On May 16, 2022, the district court granted the Petitioner's motion to reinstate the federal habeas proceeding and instructed the Respondent to answer the Petitioner's initial federal habeas petition and Supplemental Federal Habeas Petition.

Before the district court, Petitioner pressed eight (8) claims for federal habeas relief, the district court dismissed Claims 1, 2, 3, 4, 6, and 7(a)-7(c) as being unexhausted and defaulted, and, considered and addressed Claims 5, 7(d) and 7(e), and 8 on the merits.

Regarding Claim No. 4, Petitioner argued that his rights to Due Process under the 14TH Amendment to the United States Constitution were violated, because he was actually innocent imposed because the indictment did not authorize punishment as a habitual offender.

The district court held, that to the extent the Peititioner relies on an actual innocence as a gateway to present otherwise barred claims to the court, his argument would require new evidence and a showing that, in light of the new evidence, mo juror , acting reasonably, would have voted to find him guilty beyond

a reasonable doubt. Citing, McQuiggin v. Perkins, 133 S.Ct. 1924 (2013), and Floyd v. Vannoy, 894 F.3d 143 (5th Cir. 2018). The district court concluded that because the Petitioner had not presented any new evidence in these proceeding that he was innocent of sexual assault, his argument that he suffered a fundamental miscarriage of justice is unavailing. (Appendix B; p. 43).

The district court never considered and actually addressed the Petitioner's argument in opposition to the Respondent's Motion for Summary Judgment.

Petitioner argued in opposition to the Respondent's motion for summary judgment, that his claim of actual innocence survived the Respondent's contention that the claim was unexhausted and procedurally defaulted. Relying on Kuhlmann v. Wilson, 106 S.Ct. 2616 (1986), that the ends of justice will demand consideration of the merits of claims only where there is a colorable showing of factual innocence. Petitioner relied on several precedent, as in Grooms v. Lockhart, 917 F.2d 505 (8th Cir. 1990), where the court considered the question of whether a habeas petitioner was actually innocent of being a habitual offender under Arkansas Sentencing Law, however, the court found that Grooms admitted to three (3) prior felonies and denied the claim of actual innocence.

Likewise, relying on Dugger v. Adams, 109 S.Ct. 1211 (1989), as instructed, that if one is actually innocent of the sentence imposed, a federal court can excuse the procedural default to correct a fundamental unjust incarceration, that was followed by Jones v. Arkansas, 929 F.2d 375 (8th Cir. 1991, and U.S. v.

McKie, 73 F.3d 1149 (D.C. Cit. 1996). Further, relying on Fifth Circuit precedent, Petitioner argued that in order to be actually innocent of a non-capital sentence within the meaning of exception to procedural default rule, a habeas petitioner must prove that, but for consitutional error, he would not have been legally elgigble for the sentence imposed. Haley v. Cockrell, 306 F.3d 257 (5th Cir. 2002). The Petitioner further provided, in the realm of a miscarriage of justice, to give a person an illegal sentence that increases punishment, just as it is to convict an innocent person. U.S. v. Macedo, 504 F.3d 778 (7th Cir. 2005).

Petitioner presented this same argument to the United States Court of Appeals for the Fifth Circuit, in that the district court erred in concluding that the claim was unexhausted and procedurally defaulted, as his claim of actual innocence of his habitual sentence constituted a gateway for consideration of the mertis of his constitutional claim, specifically his claim of ineffective assistance of counsel. The court of appeals merely provided lip service, that the Petitioner did not meet the requirements for a Certificate of Appealability. (Appendix A).

Regarding Claims 1, 2, 3, 4, 6, and 7(a)-7(c), in opposition to the Respondent's motion for summary judgment, Petitioner argued that the claims were no unexhausted and procedurally defaulted, because: (1) the Texas Court of Criminal Appeals denied the State habeas application without written order on the findings of the trial oourt without an hearing and on the court's independent review of the record, Petitioner argued that the Court of Criminal

Appeals independent review of the record also amounted to the consideration of those claims that were submitted in the Supplemental pro se State habeas application, and which was condeded by the State during during a State habeas proceeding wherein the State argued that in general when an applicant files an Amended or Supplemental pleading raising additional claims before the Court of Criminal Appeals has disposed of the pending application, the Court of Criminal Appeals considers the merits of those claims, so long as the pleading complies with the rules and procedures of Article 11.07 et seq. of the Texas Code of Criminal Procedure and the Texas Rules of Appellate Procedure. Petitioner argued that the Texas Court of Criminal Appeals would not have allowed meritorious claims for habeas corpus relief to be dismissed without questioning the propriety of a reuquest to dismiss the application by written order.

This matter and issue was never addressed by the district court, and when pressed before the United States Court of Appeals for the Fifth Circuit that the district court erred when it fail to consider and address this matter and issue, the court of appeals fail to address this matter and issue. (Appendix A). Further, there is nothing contained within the record that disposes of the Petitioner's State habeas application that was docketed as Case No. #15-CR-1465-83-2 that was recieved and filed by the Clerk of the Texas Court of Criminal Appeals on July 01, 2021.

On June 28, 2023, after the district court had entered its Memorandum Opinion and Order, the Texas Court of Criminal Appeals

handed down its decision in Ex Parte Krueger, 2023 Tex.Crim.App.LEXIS 305 (Tex.Cr.App. June 28, 2023), instructing that jurisdiction to consider and address a State habeas application lies with the convicting court absent a proper transfer order by the convicting court. This is governed by Article 11.07, Section 3(b) of the Texas Code of Criminal Procedure, that provides: "An application for writ of habeas corpus filed after final conviction in a felony case, other than a case in which the death penalty is imposed, must be filed with the clerk of the court in which the conviction being challenged was obtained, and the clerk shall assign the application to that court. When the application is received by that court, a writ of habeas corpus, returnable to the Court of Criminal Appeals shall issue by operation of law."

Petitioner raised this issue before the United States Court of Appeals for The Fifth Circuit, and questioned whether the district court had authority to consider and address those claims considered to have been exhausted and not procedurally defaulted under the standard of review imposed by Title 28 U.S.C., Section 2254(d)(1) or (2) because the judgment of the State habeas court was void ab initio; Whether the State habeas application was properly filed under applicable State law; Whether those claims had been exhausted for the purpose of being considered and addressed by the district court.

The court of appeals denied the Petitioner's Supplemental Application for A Certificate of Appealability. (Appendix A).

The court of appeals denied the Petitioner's Motion for Leave

To File A Supplemental Brief In Support of A Certificate of Appealability, however, the record reflects, that the Petitioner merely filed a Supplemental Application for A Certificate of Appealability with Incorporated Brief In Support.

Before A Panel of the Fifth Circuit, Petitioner argued that he was deprived of his constitutional rights to Due Process under the 14TH Amendment to the United States Constitution, because he had been denied leave to file a supplemental application for a certificate of appealability, that was timely filed and within the jurisdiction of the court for consideration and addressing.

The Panel denied the Petitioner's Motion for Reconsideration. (Appendix C).

REASONS FOR GRANTING THE PETITION

Although, this Court has jurisdiction under Title 28 U.S.C., Section 1257(a) as part of its Original Jurisdiction, however, the jurisdiction of this Court extends to Title 28 U.S.C., Section 2253(c)(1), that is straight forward, "Unless a circuit justice of judge issues a Certificate of Appealability (COA), an appeal may not be taken to the court of appeals." It is to note, that this Court has not provided any instructions or guidance as to how a federal habeas petitioner is to apply for a COA in this Court. The statutory provisions Section 2253(c)(1) and the Supreme Court Rules provides no applicable procedure for a federal habeas petitioner's statutory entitlement.

To the contrary, appears that this Court has jurisdiction and the authority by way of Certiorari to determine where a court of appeals should have issued a COA. Miller-El v. Cockrell, 123 S.Ct. 1029 (2003), and Hohn v. U.S., 118 S.Ct. 1969 (1998). Therefore, Rule 10 of the Supreme Court Rules should have no bearing on the Petitioner's quest for a COA, whereby review on a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for compelling reasons. Such a requirement would dispense the requirement for obtaining a COA.

Under the combination of Section 2253(c)(1) and (2), "Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from - (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court. (2)

A certificate of appealability may issue under paragraph (1) only if the applicant had made a substantial showing of the denial of a constitutional right."

A court has no discretion in determining what the law is or in applying the law to the particular facts of a case. Further, a "court" has no authority to judicially rewrite the law or to vary from the clear language and text of the law. Section 2253(c)(2) is straight forward, and this Court should have no discren in the operation of the statute, that anhabeas corpus petitioner only has to make a substantial showing of the denial of a constitutional right, that can be existing as or in substance. The statute is, res ipsa loquitur, it means what it says, however, the judiciary has clearly added to the statutory provisions.

This Court has instructed, that when the district court has denied a claim on procedural grounds, for the purpose of a COA, the habeas petitioner must not only make a substantial showing of the denial of a constitutional right, but also must demonstrate that a reasonable jurists would find it debatable whether the district court was correct in its procedural ruling. Slack v. McDaniel, 120 S.Ct. 1595 (2000). When the district court has denied a habeas petitioner's constitutional claim on the merits, for the purpose of a COA, a habeas petitioner must demonstrate that a reasonable jurists would find the district court's assessment of the constitutional claim debatable or wrong, or that a reasonable jurists could conclude that the issue presented is adequate to deserve encouragement to proceed further. Slack, and Miller-El.

Thus, the determination as to whether a habeas petitioner has made a substantial showing of the denial of a constitutional right, is to "state" a valid claim of the denial of a constitutional right. The question is whether the habeas petitioner has raised a facially valid constitutional claim...

Further, a court of appeals resolves doubts whether to grant a COA from a district court's denial of a federal habeas petition in favor of the federal habeas petitioner. Hill v. Johnson, 210 F.3d 481 (5th Cir. 2000).

Therefore, the first question to be determined by this Court is whether the Petitioner has facially stated a valid claim of the denial of a constituional right?

The answer to this question is yes, as the Petitioner has raised has facially raised a valid constitutional claim or claims by arguing, that: (1) He was deprived of his constitutional right effective assistance of counsel under the 6TH Amendment to the United States Constitution, because appellate counsel fail to (a) challenge evidence of the complainat's prior accusations under Davis v. Alaska, 94 S.Ct. 11.05 (1974), rather than under Rule 412 of the Texas Rules of Evidence; (B) raise an issue regarding the court's admission of phone calls between Petitioner and his daughter that were recorded when Petitioner was awaiting trial in the Galveston County, Jail; (c) rail to raise an issue regarding the Jury Charge's failure to include an instruction for the prosecution to prove why consent was lacking; (c) failed to raise an issue about the indictment's failure to invoke the trial court's

jurisdiction because the indictment did not contain an essential element of the offense charged as to why consent was lacking; (d) failed to raise an issue regarding the Texas Habitual Sentencing Scheme; and because trial counsel fail to (a) to subpoena and call witnesses who could have testified regarding the complainant's credibility and her propensity to allege a sexual assault; (b) to challenge several prosecution witnesses regarding whether they were a fact or expert witness; (c) impeach the complainant with her prior inconsistent statements to support the theory that the complainant had consented and no sexual assault occurred; (d) to object to the admission of certain phone records into evidence because they were not properly authenticated and irrelevant; (e) object to the sentencing of the Petitioner has a habitual offender; (f) object to the indictment on the grounds that it failed to properly charge a theory as to why consent was lacking, object to the Jury Charge that did no require the jury to find why consent was lacking, object to the Jury Charge that did not require a Unanimous Verdict as to why consent was lacking; (g) convey a 15-year plea offer to the Petitioner; (h) rejected a five-year plea offer without consulting with the Petitioner. To include, that Petitioner is actually innocent of the sentence imposed because the indictment did not authorize the Petitioner be sentence as a habitual offender under the Texas Sentencing Scheme.

Therefore, Petitioner has crossed the first hurdle and requirement for the matter of of a COA, and a reaonable jurists would find

it debatable as to whether the Petitioner has stated a valid claim of the denial of a constitutional right. Further, more Petitioner has made a substantial showing of the denial of a constitutional right. Thus, the court of appeals erred when it determined that the Petitioner fail to meetthis requirement.

The next question to be determined by this Court is whether a reasonable jurists would find it debatable as to whether the district court was correct in its procedural ruling. This is the substance of this Court's determination as to whether the court of appeals should have issued a COA from the district court's procedural ruling.

At issue is the Petitioner's claim of Actual Innocence, because the indictment did not authorize the Petitioner to have punishment assessed against him as a habitual offender. In better terms, the sentence imposed against the Petitioner was constitutionally illegal and unauthorized.

The district court held that this claim was unexhausted and proceedurally defaluted. On one hand the district court hled that the Petitioner failed to demonstrate a fundamental miscarriage of justice because the argument was grounded in State law which could not provide a basis for federal habeas relief. On the other hand, the district court held that to the extent the Petitioner relied on actual innocnece as a gateway to present his otherwise barred claims, the argument would require new eivdence and a showing that in light of the new evidence, no juror, acting reasonably would have voted to find him guilty beyond a reasonable doubt.

For support, the district court cited and relied on this Court's holdings in McQuiggin v. Perkins, 133 S.Ct. 1924 (2013), and Circuit precedent set out in Floyd v. Vannoy, 894 F.3d 143 (5th Cir. 2018).

ON the matter, this Court's holdings in McQuiggin, did not announce a new rule of constitutional law, rather, it merely applied a long established equitable exception to the 1-year Statute of Limitation under Title 28 U.S.C., Section 2244(d).

The claims presented and pressed by the Petitioner were not dismissed as untimely. Cf., Walker v. AG Pa. 2021 U.S.App.LEXIS 38872 (3rd Cir. 2021). The McQuiggin exception is inapplicable in this case. Likewise, the 5th Circuit holdings in Vannoy are inapplicable as it was instructive premised on a showing of actual innocence to overcome the time bar.

In the district court, Petitioner relied on Circuit precedent set out in Haley v. Cockrell, 306 F.3d 257 (5th Cir. 2002); wherein the court of appeals extended the actual innocence exception to non-capital sentencing. The court held that the petitioner showed he was actually innocent of the predicate violation for the sentence enhancement and, that such exception to the procedural bar applied to non-capital cases for a habitual offender finding during the phunishment phase, and a rational trier of fact could not have found beyond a reasonable doubt that the petitioner had been convicted of two felonies. On Certiorari to this Court, this Court held that a federal court faced with allegations of actual innocence, whether of the sentence of of the crime charged,

must first address all non-defaulted claims of comparable relief and other grounds for cause to excuse the procedural default.

In essence this Court declined to answer the question of whether a claim of actual innocence extends extends to a non-capital sentencing scheme.

This Court should take the time to reconsider its position on whether a claim of actual innocence applies in the context of a non-capital sentencing scheme.

In Vosgien v. Person, 742 F.3d 1131 (9th Cir. 2014), the court held that if a federal habeas petitioner, who has procedurally defaulted his constitutional claim raises sufficient doubt about his guilt to undermine confidence in the result of the trial without the assurance that the trial was untainted by constitutional error, the federal habeas petitioner overcomes the procedural bar created by the default, and the district court may consider the federal habeas petitioner's constitutional claim or claims on the merits, which in this case, the Petitioner's ineffective assistance of counsel claim. The court instructed that one way a federal habeas petitioner can demonstrate a claim of actual innocence is to show that in light of "subsequent case law," that he cannot, as a legal matter, have committed the alleged crime..

However, given the Fifth Circuit's decision exacerbated a growing divergence of opinion in the Court of Appeals regarding the availability and scope of the actual innocence exception in the noncapital sentencing context. To the contrary, several

Circuits have embraced the rationale that an actual innocence exception applies in noncapital sentencing context when the error is related to finding of predicate act forming the basis for enhancement. Spence v. Meadow Correctional Facility, 219 F.3d 162 (2nd Cir. 2000). Actual innocence exception applies in noncapital sentencing context where error relates to a recidivist enhancement. U.S. v. Mikalajunas, 186 F.3d 490 (4th Cir. 1999).

In Dretke v. Haley, 124 S.Ct. 1847 (2004), this Court was asked in that case to extend the actual innocence exception to a procedural default of a constitutional claim or claims challenging a noncapital sentencing error. This Court declined to answer the question given the posture of that case, and instead hled that a federal court faced with an allegation of actual innocence, whether of the sentence or of the crime charged, must firs address all nondefaulted claims or claim for comparable relief and other grounds for cause to excuse the procedural default.

Given Fifth Circuit precedent, and other Circuit precedent, reasonable jurists would find it debatable whether the district court's determination that the Petitioner's claim or claims were precedural defaulted in view of the Petitioner's actual innocence claim challenging a noncapital sentencing error. Further, Petitioner ask in the present case to extend the actual innocence exception to a procedural default of a constitutional claim challenging a noncapital sentencing error.

Therefore, the court of appeals should have issued a COA to appeal the district court's determination on this matter.

Further, the reliance on the decision in McQuiggin by the district court is misplaced, as it only pretains to the actual innocence exception as applied to the 1-year limitation period.

Turning to the matter of exhaustion of available State remedies, as the deistrict court held that the claim or claims wereuunexhausted.

Notwithstanding, the provisions of Title 28 U.S.C., Section 2254(b)(2), that an application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the court of the State, it is argued that the district court abused itsdiscretion by failing to consider and address the claim or claims considered to be unexhausted. To consider and address those claims surely were within the discretionof the district court when viewed as in the interestof justice and the administration thereof, or that it would be a miscarriageof justice not to consider the claim or claims.

Since this Court's decision in Rose v. Lundy, 102 S.Ct. 1198 (1982), it was instructed that as a matter of "comity," a federal court should not consider a claim in a habeas corpus petition until after the State courts have had the opportunity to act.

This Court held that "comity" is the basis for the "Exhaustion Doctrine," as it is a principle for controlling all habeas corpus petitions to the federal courts, that those courts will interfere with the administration of justice in the State courts only in rare cases where exceptional circumstances of peculiaruurgency are shown to exist...Id. However, in Colman v. Thompson, 111

S.Ct. 2546 (1991), this Court reinstated its position regarding a federal habeas petitioner's exhaustion of available State remedies as to the federal claim or claims pressed in a federal court. The instructed that a State prisoner's federal habeas petition should be dismissed, rather than just the claim or claims presented, if the habeas petitioner has not exhausted available State remedies as to any of his or her federal calim or claims. This Court furthered, that the exhaustion doctrine is principally designed to protect the State court's role in the enforcement of federal law and prevent disruption of State judicial proceedings. Proceedings that are far from protecting a federal criminal defendant's constitutional rights secured under the United States Constitution.

Rahter than dismiss the Petitioner's federal habeas petition, the district court considered and addressed several claims pressed in the Petitioner's federal habeas petition that had not been exhausted under available State remedies.

After the district court's determination in this case on March 15, 2023, and while the Petitioner's Application for A COA was pending in the court of appeals, the Texas Court of Criminal Appeals delivered a decision that affected several aspect of federal law and a federal habeas petitioner's petition for federal habeas relief under Section 2254 et seq.

In Ex Parte Krueger, 2023 Tex.Crim.App.Unpub.LEXIS 305 (Tex.Cr.App. June 29, 2023), the Court of Criminal Appeals established that only the court of conviction has jurisdiction over a post-conviction writ of habeas corpus filed under the provisions of Article 11.07

et seq. of the Texas Code of Criminal Procedure.

In Krueger, the Court of Criminal Appeals found that the applicant was convicted in the 22ND Judicial District Court of Comal County, Texas, however, the habeas record was complied by the 466TH Judicial District Court of Comal County, Texas. It was established that there was nothing contained in the record which supported the jurisdiction of the 466TH Judicial District Court of Comal County, Texas, to address the issues raised by the applicant in the application.

Although, the application was filed int the Court of conviction in which the conviction was being challenged, there was no proper Transfer Order, transfering jurisdiction from the 22ND Judicial District Court of Comal County, Texasato the 466TH Judicial District Court of Comal County, Texas.

This decision is instructive of Article 11.07, Section 3(b) of the Texas Code of Criminal Procedure, that mandates that the application be filed with the clerk of the court in which the conviction being challenged was obtained.

The district court stated in its Memorandum Opinion and Order that the Petitioner was convicted in the 405TH Judicial District Court of Galveston County, Texas. However, the district court fail to note the State habeas court the Petitioner's State habeasatioou application was filed in.

In the instant case, the State Habeas Record clearly reflected that the Petitioner's State habeas application was filed with the 122ND Judicial District Court of Galveston County, Texas, absent a Transfer Order from the 405TH Judicial District Court.

Therefore, in accordance with Krueger, the 122ND Judicial District Court did not have jurisdiction over the Petitioner's State habeas application, and since the application was never filed in the proper court, a writ of habeas corpus never issued made returnable to the Texas Court of Criminal Appeals by operation of law. Section 3(b) of Article 11.07 of the Texas Code of Criminal Procedure, provides, that: "An application for writ of habeas corpus filed after final conviction in a felony case, other than a case in which the death penalty is imposed, must be filed with the clerk of the court in which the conviction being challenged was obtained and the clerk shall assign the application to that court. When the application is received by that court, a writ of habeas corpus, returnable to the Court of Criminal Appeals, shall issue by operation of law." Therefore, the Court of Criminal Appeals never acquired jurisdiction over the application, and the claims remain unadjudicated and unexhausted under applicable State law.

Petitioner advanced this same argument before the Court of Criminal Appeals, that ignored the Petitioner's argument, but excepted Krueger's argument.

Petitioner did not advance such an argument before the district court due to the lack of supportative authority regarding State law application, and when pressed before the Court of Appeals, the court of appeals treated the Petitioner's Supplemental Application for A COA as a motion for leave to file a Supplemental Brief in support of a COA motion, and denied the same.

In light of the mischaracterization of the Petitioner's Supplemental Application for A COA by the court of appeals, the court of appeals did not assign a reason for its denial, thus, the Petitioner will argue that such denial was on the merits.

Petitioner pressed before the court of appeals, that the district court erred when it (1) considered the claim or claims adjudicated on the merits and reviwed the claimsor claimsunder the provisions of Section 2254(d)(1) and (2), and (2) considered the claim or claims exhausted.

In view of the 1-year limitation period under the provisions of Title 28 U.S.C., Section 2244(d), this Court has explcitly instructed that the federal courts are required to apply governing State procedural law in determining whether an application for State post-conviction relief "is properly filed" or "is pending."

In construing the provisions of Section 2244(d), this Court instructed that aState habeas application is properly filed when its delivery and acceptance are in compliance with the applicable State laws and rules governing filings...

Since, there was no issue regarding whether the Petitioner's federal habeas petition was time-barred, the district court paid no mind as to whether the Petitioner's State habeas application was in fact properly filed and pending, which should have been the district court's first determination upon the filing of the instant federal habeas petition.

Further, the matter of whether the claims had been adjudicated on the merits was a matter for determination by the district

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court before addressing the claim or claims under the provisions of Section 2254(d)(1) or (2). However, the fist matter of business for the district court was determine whether or not the claim or claims were exhausted, which in this case, the district court determined that the claim of claims were exhausted...

The Petitioner requested the court of appeals to grant a COA on this matter, or alternatively remand the case to the district court for consideration, since the new legal decision by the Texas Court of Criminal Appeals had been delivered while his application for a COA was pending before that court.

It is not understood, if the material was unclear or in complete, but if the material was unclear or in complete, the court of appeals should have granted a COA.

It is clear, however, that the court of appeals abused its discretion when it denied the Petitioner's Supplemental Application for A COA upon a legal issue that was decided while the application was pending, and not after the court of appeals had ruled on the application.

It is matter for this Court as to whether, the court of appeals abused its discretion when it denied the Petitioner's Supplemental Application for A COA on legal issues that affected the whole structure of federal law on federal habeas review.

This is a matter of State law as related to Texas cases upon a claim or claims presented in a State habeas application, and then pressed in a federal court upon a federal habeas petition for review. Can one matter be overlooked that is the substance

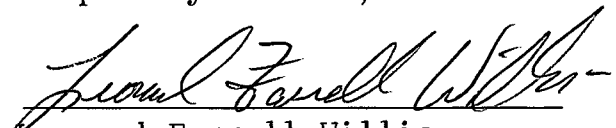
of another matter that will be considered and addressed?

On this matter, reasonable jurists could debate whether the court of appeals abused it's discretion when it denied the Petitioner's Supplemental Application for A COA on a legal issue that affected the decisional making process of the district court regarding a federal habeas petition filed by a State prisoner under the provisions of Section 2254, et seq.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Leonard Farrell Willis

Date: January 26, 2024