No. 24-7163

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Jose Nieves Briones — PETITIONER
(Your Name)

vs.

Bobby Lumpkin, Dir., TDCJ — 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

Jose Nieves Briones
(Your Name)

810 F.M. 2821, West Hwy. 75, N.
(Address)

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

(936) 295-9126
(Phone Number)

QUESTION(S) PRESENTED

QUESTION No. 1: DOES THE UNITED STATES SUPREME COURT HAVE JURISDICTION TO REVIEW THE DENIAL OF A CERTIFICATE OF APPEALABILITY BY A COURT OF APPEALS ABSENT A FINAL JUDGMENT OR DECREE?

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 FEDERAL HABEAS PETITION WAS TIME-BARRED WHEN REASONABLE JURISTS COULD DEBATE THAT THE !-YEAR LIMITATION PERIOD COMMENCED UNDER TITLE 28 U.S.C., SECTION 2244(d)(1)(D) ON THE DATE THAT THE AFFIDAVIT WAS EXECUTED OR THE DATE THAT PETITIONER BECAME AWARE OF THE AFFIDAVIT IN SUPPORT OF HIS CONSTITUTIONAL CLAIM?

QUESTION No. 3: WHETHER THE COURT OF APPEALS SHOULD HAVE ISSUED A CERTIFICATE OF APPEALABILITY FROM THE DISTRICT COURT'S DETERMINATION THAT THE PETITIONER'S FEDERAL HABEAS CORPUS PETITION WAS TIME-BARRED WHEN REASONABLE JURISTS COULD DEBATE WHETHER THE PROCEDURAL RULING WAS CORRECT UPON THE DISTRICT COURT'S CONSIDERATION OF THE MERITS OF THE PETITIONER"S CONSTITUTIONAL CLAIM IN THE DETERMINATION THAT THE PETITION WAS TIME-BARRED?

QUESTION No. 3: WHETHER THE COURT OF APPEALS SHOULD HAVE ISSUED A CERTIFICATE OF APPEALABILITY FROM THE DISTRICT COURT'S DETERMINATION THAT THE PETITIONER'S FEDERAL HABEAS CORPUS PETITION WAS TIME-BARREDDWHEN REASONABLE JURISTS COULD DEBATE WHETHER THE PROCEDURAL RULING WAS CORRECT UPON THE DISTRICT COURT"S FAILURE TO CONSIDER AND TAKE INTO ACCOUNT THE PETITIONER"S CONFINEMENT IN ITS DUE DILIGENCE INQUIRY?

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

LIST OF PARTIES

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

[X] 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: Stephanie Wawrzynski, Assistant Attorney General, State of Texas, P.O. Box 12548, Austin, Texas. 78711-2548

RELATED CASES

Briones v. State,
2005 Tex.App.LEXIS 5531 (Tex.App. 5th Dist. July 15, 2005)

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] 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,
[X] 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,
[X] 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

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was November 21, 2024.

[X] 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: _____, 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. § 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).

2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article III, Section 2, Cl. 2; In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction in all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Title 28 United States Code Annotated, 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- the final order in a habeas corpus proceeding in which the detention complained of aries out of process issued by a State court.

Title 28 United States Code Annotated, Section 2253(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.

STATEMENT OF THE CASE

This is a federal habeas corpus proceeding before the United States District Cout for the Northern District of Texas, Dallas Division pursuant to Title 28 USS.C., Section 2254 et seq. in No. #3:21-CV-957-B-BN, Styled: Jose Nieves Briones v. Bobby Lumkin, Director, TDCJ-CID, filed on April 26, 2021.

On January 05, 2024, a United States Magistrate Judge delivered a Findings, Conclusion & Recommendation, recommending that the petition be dismissed with prejudice as time-barred under the provisions of Title 28 U.S.C., Section 2244(d)(1).

Petitioner timely filed a Written Response & Objections to the Findings, Conclusion & Recommendation of the Magistrate Judge, and on March 22, 2024, the district court entered an Order Adopting Findings & Recommendation of the Magistrate Judge, and denying a Certificate of Appealability, and Overruling the Petitioner's Objections. (Appendix B). The district court the same date entered Judgment denying the petition and dismissing the same with prejudice.

The district court in adopting the Findings & Recommendation of the Magistrate Judge overruled the Petitioner's objections & argument under Title 28 U.S.C., Section 2244(d)(1)(D) that the 1-year limitation period commenced on the date that he received the affidavit establishing the claim that his conviction was based on false and/or misleading testimony in violation of his constitutional rights to Due Process under the 14TH Amendment to the United States Constitution.

Petitioner argued that the 1-year limitation period commenced on August 29, 2020, the date he acquired the affidavit from the victim showing that his conviction was premised and based on perjury testimony.

The Magistrate Judge held that although the Petitioner said that he received evidence of the recantation on August 29, 2020, in the form of the recanting affidavit executed that same day, the Petitioner did not allege that he was unaware of the recantation until he got the affidavit, and even if he did make that argument, it would not speak to the diligence, if any, that he used up until that point.

The Magistrate Judge furthered that the Petitioner provided no arguement or evidence to establish that he could not have through due diligence discovered the allege perjury before the complainant executed her recanting affidavit on August 29, 2020, and thus failed to establish that Subsection D or B supplies the accrual date for his federal habeas claims.

In objection to the Magistrate Judge's recommendation, and in overruling the Petitioner's objection, the district court avverred that the Petitioner alleges that he was unaware of the recantation until he received the affidavit, and as for diligence complained that ti would have been difficult for him to obtain any information from the complainant because he was precluded from contacting her and could not afford to hire an investigator.

The district court never considered and/or take into account his limitation in exercising due diligence because he was a prisoner.

The district court held that the Petitioner failed to establish that Section 2244(d)(1)(D) applied by addressing the merits of the Petitioner's perjury claim. (Appendix B).

Petitioner presented the same argument to the court of appeals for issuance of a Certificate of Appealability (COA) to appeal the determination of the district court. The court of appeals paid lip service to the issues presented by the Petitioner and entered a conclusionary decision that the Petitioner failed to make the requisite showing for the issuance of a COA. (Appendix A).

REASONS FOR GRANTING THE PETITION

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

A COA 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 2253(c)(2).

This Court has established that a COA is a jurisdictional prerequisite, and until a COA has been issued, the federal courts of appeals lacks jurisdiction to rule on the merits of the appeal from a habeas petitioner. Miller-El v. Cockrell, 123 S.Ct. 1029 (2003).

Although, the provisions of Section 2253 is res ipsa loquitur, this Court has interpreted the Statute to mean that, "[w]here the district court has dismissed a federal habeas petition without addressing the merits of the claim or claims presented, on procedural grounds, the petitioner must show that reasonable jurists could debate whether the district court was correct in its procedural ruling and, that reasonable jurists could find it debatable that the petition states a valid claim of the denial of a constitutional right." Slack v. McDaniel, 120 S.Ct. 1595 (2000). An doubts whether to grant a COA should be resolved in the petitioner's favor. Hill v. Johnson, 210 F.3d 481 (5th Cir. 2000).

In addressing a habeas corpus proceeding under Title 28 U.S.C., Section 2255, this Court held that it has jurisdiction and authority by way of "Certiorari" to determine whether a court of appeals should have issued a COA to appeal the determination and decision of a district court. Hohn v. U.S., 118 S.Ct. 1969 (1998), and Miller-El, applying this rethoric to a Section 2254 habeas corpus proceeding.

However, Title 28 U.S.C., Section 1254(1) provides, that: cases in the court of appeals may be reviewed by the Supreme Court by the following methods - By writ of certiorari granted upon the petition of any party to any civil or criminal case,

before or after rendition of judgment or decree.

However, a certiorari cannot properly be issued to require a circuit court of appeals to send up a case over which it has no jurisdiction for determination on the merits, when it has not rendered any decision in the case. Goodshot v. U.S., 21 S.Ct. 33 (1900). The jurisdiction of this Court under a certiorari lay only from final appealable judgments or decrees. Due to the lack of finality of a case on the "merits," this Court does not have appellate jurisdiction under Section 1254(1), because until a COA has been issued, a federal court of appeals lacks jurisdiction to rule on the merits of the appeal from a habeas petitioner. See., Article III, Section 2, Cl. 2 of the United States Constitution.

This Court has never explicitly held that a federal habeas petition under the provisions of Title 28 U.S.C., Section 2254 meets the Section 1254(1) description which confines Supreme Court's certiorari jurisdiction under Section 1254(1) to cases in court of appeals. In Miller-EL, the question of this Court's jurisdiction was not before the Court, as to whether it could review the determination of the court of appeals not to grant a COA given the lack of finality and/or the adjudication of the case on the merits.

Therefore, this Court should determine whether it has jurisdiction to review the determination of a court of appeals to deny a COA by way of certiorari when there has not been a final appealable judgment or decree as to meet the requirement of Section 1254(1).

The court of appeals improperly sidestepped the COA process by denying the Petitioner's request for the issuance of a COA

based on its view of the merits.

In reviewing the facts and circumstances of the Petitioner's case, the court of appeals paid lip service to the principles of law that is suppose to guide that court in the determination of whether to grant and/or deny a request for the issuance of a COA, and actively held the Petitioner to a for more stringent standard.

Specifically, the court of appeals sidestepped the threshold COA process by first deciding the merits of the Petitioner's appeal, and, then justified the denial of the Petitioner's request for the issuance of a COA based on its adjudication of the actual merits of the Petitioner's claim, thereby in essence deciding an appeal without jurisdiction. The threshold nature of a COA inquiry would mean very little if appellate review was denied because the habeas petitioner did not convince a judge or for that matter, three judges, that he or she would prevail.

In the Petitioner's case, that is exactly what the court of appeals did. Petitioner filed an application for a COA seeking the issuance of a COA so, that he could appeal the district court's determination that the federal habeas petition was time-barred, based on the perjury claim being untimely under the Petitioner's argument that the claim did not commence until the date that he received the Affidavit, because Petitioner was unaware of the factual allegations until the date he received the affidavit.

The district court held this date to be August 29, 2020, that rendered the filing of the Petitioner's federal habeas petition on April 26, 2021, timely. In summary the court of appeals held

that the Petitioner contended that he was entitled to statutory and equitable tolling of the limitations period, and challenged the district court's alternative ruling regarding his claim that his conviction was based on perjured testimony in violation of his due process rights. In a bald assertion and conclusion of law, the court of appeals simply referred to the law governing review of a request for a COA and then held that the Petitioner failed to make the requisite showing...

The question before the court of appeals was whether the district court erred by holding that the Petitioner was not entitled to both statutory and equitable tolling of the 1-year limitation by virtue that the 1-year limitation period commenced on the date that he received the affidavit and became aware of the factual predicate of the claim, rahter than the date the affidavit was signed?

Under one aspect, for review by this Court the question is whether the court of appeals should have issued a COA from the district court's determination of the case; or whether the issue presented is adequate to deserve encouragement to proceed further?

Under the other aspect, it is the Petitioner's request for the issuance of a COA by this Court to appeal the determination of the district court that the petition is time-barred because the Petitioner is not entitled to either statutory or equitable tolling of the 1-year limitation period without the consideration of the merits of the claim? Petitioner argues that on this matter, the district court's determination is highly questionable, and at best suspect.

Under the promulgation stated law, for a COA to issue, Petitioner must demonstrate that reasonable jurists could debate whether the district court was correct in its procedural ruling, and if so, the court of appeals itself should have issued a COA.

Without addressing the merits of the Petitioner's perjury claim, the question is whether the 1-year limitation period commenced on the date that Petitioner received the affidavit, rahter than the date the affidavit was executed?

The district court held that in the context of recanting witness affidavits and accrual under Subsection D, federal courts have hld that the limitations period begins when the petitioner knew or would have discovered that the witness would recant his or her testimony, not when the affidavit is excuted. To support this contention, the district court relied on numerous unpublished opinions and citations in the mist of its persuasive value and therefore has no precedential value to support the district court's adjudicative holding that the Petitioner's federal habeas petition was time-barred...

Under Title 28 U.S.C., Section 2244(d)(1)(D), the statutory requirement to be met is straight forward, that the 1-year limitation period does not begin to run until the date on which the factual predicate of the claim presented could have been discovered through the exercise of due diligence.

The issue is the date on which the factual predicate of the claim presented could have been discovered through the exercise of due diligence, and not whether the factual predicate of the claim would have entitled the Petitioner to habeas corpus relief.

Before this Court in request for the issuance of a COA, Petitioner must demonstrate that reasonable jurists could debate whether the district court was correct in its procedural ruling. It is clear that under Rule 10 of the Supreme Court Rules the factors set forth or considerations governing review on certiorari is a far more stiengent standard to meet for the issuance of a COA by this Court by way of certiorari.

The district court in support of it's position that the limitation period commenced on the date that the affidavit was executed relied on the unpublished opinions in Bates v. Metrish, 2010 U.S.Dist.LEXIS 32732 (E.D. Mich. Mar. 30, 2010), and Webb v. Bell, 2008 U.S.Dist.LEXIS 42825 (E.D. Mich. May 30, 2008).

In Daniels v. Uchtman, 421 F.3d 490 (7th Cir. 2005), the court of appeals in affirming the determination of the district court that the petition was time-barred agreed that the 1-year limitation period commenced on the date that the affidavit was executed establishing the factual predicate for the claim. See., Fusi v. O'Brien, 550 F.Supp.2d 167 (D. Mass. 2008); the factual predicate of the claim could not have been discovered through reasonable efforts before the affidavit was signed. Cf., McQuiggin v. Perkins, 133 S.Ct. 1924 (2013); if the petition alleges newly discovered evidence, the filing deadline is one year from the date on which the factual predicate of the claim could have been discovered through due diligence using the date the affidavit(s) were signed.

Further, a due diligence inquiry concerning the 1-year limitation period for filing a federal habeas corpus petition should take into account the fact that prisoners are limited in exercising

diligence by their physical confinement. Moore v. Knight, 368 F.3d 936 (7th Cir. 2004), and Wims v. U.S., 225 F.3d 186 (2nd Cir. 2000).

Certainly, a habeas petitioner cannot ascertain that which is unknown to him, or inquire into a matter which he is unaware of, such as a witness testifying falsely to something he has no knowledge of until the witness comes forth...

The district court did not take into consideration the date the affidavit was signed as to commence the 1-year limitation period, and had the district court taken into consideration the date that the affidavit was executed as to commence the 1-year limitation period, the federal habeas corpus petition in this case would have been timely filed. Further, had the district court taken into consideration the date that the Petitioner received the affidavit and actually became aware of the factual predicate for the claim, the federal habeas petition would have been timely filed, because the Petitioner's State habeas application was filed within weeks of receiving the affidavit.

Therefore, Petitioner has shown that reasonable jurists could debate whether the district court was correct in its procedural ruling that the instant federal habeas petition was time-barred, as the 1-year limitation period could have commenced at the latest of when the affidavit was signed.

Further, Petitioner has shown that reasonable jurists could debate whether the district court was correct in its procedural ruling that the instant federal habeas petition was time-barred on the contention that Petitioner failed to excersice due diligence, because the district court fail to take into consideration the Petitioner's physical confinement.

This Court can reasonably find that the court of appeals should have issued a COA for the Petitioner to appeal the determination of the district court that the petition was time-barred.

The petition supports a vaild constitutional deprivation, and claim that the conviction at hand was contrieved and premised on perjury testimony.

This Court should take the opportunity to settle any dispute

amongst the Circuits as to whether the 1-year limitation period can commence upon the execution and signing of an affidavit recanting trial testimony, or revealing that certain testimony given during a criminal defendant's trial by a witness was false.

CONCLUSION

The petition for a writ of certiorari should be granted,

Respectfully submitted,

Jose N. Briones

Jose Nieves Briones

Date: February 14, 2025