

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

JOHN DOUGLAS MITCHELL, JR., §
vs. § CAUSE NO. 17-9383
LORIE DAVIS. §

Rule 44.2. PETITION FOR REHEARING IN DENIAL OF:

PETITION FOR WRIT OF CERTIORARI

COMES NOW, John Douglas Mitchell, Jr., "Petitioner" in the above-styled and numbered cause, and presents this his Petition for Rehearing of an order denying a petition for writ of certiorari, pursuant to Supreme Court Rule 44.2, and would show the Court the following:

I.

TIMELINESS

On October 1, 2018, this Honorable Court entered the following order in the above-entitled case: "The petition for a writ of certiorari is denied." signed by clerk of the Court Scott S. Harris. Therefore, to be deemed filed timely, the Petitioner must place this his Petition for Rehearing in the institutional mailing system on or before, Friday, October 26, 2018. See, Supreme Court Rules, 29.2, 44.2; See also, Houston v. Lack, 487 U.S. 266, 270-272 (1988)

II.

Pursuant to Supreme Court Rule 44.2. the instant Motion for Rehearing is to be limited to the intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented.

This Honorable Court, to the knowledge of the Petitioner, has never directly addressed the issues presented in Question F: that being when exactly does the period of limitation begin under 2254(d)(1)(D), which states: "the date on which the factual predicate of the claims or claims presented could have been discovered through the exercise of due diligence." Id.

In the instant case, the Petitioner presented to the State court affidavits that were executed after the initial filing under State habeas statutes. The State Court decided that the issues were not of such a matter that they met the draconic standards of the Texas habeas statutes which are being improperly applied concerning subsequent applications.

In the State of Texas pursuant to Texas Code of Criminal Procedures Art. 11.07 § 4(a)(1)-(2), states:

(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." (emphasis added)

The State of Texas has ignored the plain language of the habeas statute and instead attempted to apply an arbitrary standard that matched the federal standards. See, Ex parte Torres, 943 S.W.2d 469, 473 (Tex.Crim.App. 1997) The Texas court of Criminal Appeals is forcing applicants under the habeas statute to demonstrate both section (1) and (2), instead of section (1) or (2).

The inclusion of the unambiguous usage of the word or states that Section (1) and Section (2) of Texas Code of Criminal Procedure are separate, and it is not necessary for both portion of the statute to be demonstrated to show cause for a subsequent application.

Webster's New World Dictionary, 5th Ed. 2014 states: "And, (1) in addition; also; as well as: used to join elements of similar syntactic structure," similarly, Or is defined as: "a coordinating conjunction introducing an alternative; specif a) introducing the second of two possibilities, b) introducing any of the possibilities in a series, but usually used only before the last, c) introducing a synonymous word or phrase, and d) introducing the second of two possibilities when the first is introduced by either or whether."

Through the unambiguous usages of the plain meaning of the word "or" the statute separates the portion to be applied separately, however, the State of Texas, specifically, the Texas Court of Criminal Appeals is applying the statute as if there was

an "and," present within the statute joining the separate provisions.

Plainly, the Petitioner did not receive a full and fair hearing when he attempted to return to the State Court pursuant to statute in an attempt to exhaust the newly discovered evidence. After the Court of Criminal Appeals dismissed his subsequent application the Petitioner presented the claim for review in the federal court to timely amendment his original application.

The instant issue, is the refusal to review the claim due to a procedural bar that was erroneously applied against the Petitioner in the federal court. The instant claim was deemed time barred, however, plainly under the federal statute the claim was not reasonably available to the Petitioner until after the date on the affidavit. Therefore, pursuant to statute the petitioner's claim was ripe for review in the federal court by virtue of exhaustion and well within the one year period of limitation under federal law. (See Original Petition for writ of Certiorari at pp. 18-23)

Throughout the proceeding in the instant case, the petitioner has been held to an unreasonable standard, and the federal court, with reference to the issue of ineffective assistance of counsel on appeal, applied the wrong standard of this Honorable Court. (See, Original Petition for Certiorari at pp. 16-18)

The Petitioner request this Honorable court to remand the case to the Court of Appeals for a proper de novo review of the issues

of the District Court's improper application of the precedence of this Honorable Court.

The issues before the Court should be reviewed as the State of Texas, similar to the issues during the confirmation of the newest associate justice, utilized a "nuclear option," to get what it deemed a problem off the street. The Petitioner was acquitted on two of the three charges, and minus the egregious conduct of the prosecutors, and ineffective assistance of counsel, would have been found not guilty of the final count. In fact, there is absolutely zero evidence supporting the only conviction in the instant case. Trial counsel on his own initiative made statements that alerted the prosecution that there was zero evidence presented concerning count two. Thereby, allowing the State to infect the trial with due process violations and unsupportable evidence alleged to have occurred concerning count two. There was no evidence aside from perjured testimony and uncorroborated testimony of the alleged victim alone. Aside from the unsubstantiated statements of the alleged victim, put on after trial counsel alerted the prosecution to their mistake, and lack of evidentiary support for said count. The Petitioner would have never been convicted, but for the unprofessional errors of trial counsel which amounted to a double prosecutor for the State through counsel's mistakes.

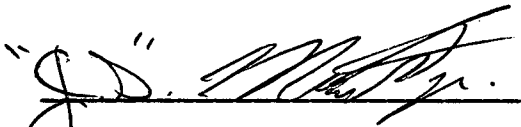
III.

CONCLUSION

WHEREFORE PREMISES CONSIDERED, the Petitioner, John Douglas

Mitchell, Jr., respectfully prays after a rehearing in the instant case, GRANT, the Petition for writ of certiorari, and at minimum issue a Memorandum Opinion instructing the Federal Court to properly apply proper standard, supra, pursuant to precedence of this Honorable Court, as demonstrated in the Original Petition for writ of Certiorari, and remand the case back to the jurisdiction of the Court of Criminal Appeals for the State of Texas, at Austin.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "J.D. Mitchell, Jr.", is written over a horizontal line.

John Douglas Mitchell, Jr.
Eastham Unit #1315658
2665 Prison Road #1
Lovelady, Texas 75851

cc:file/JDM

cc:The Attorney General of Texas, Ken Paxton