No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Ricky Lee Stroble — PETITIONER
(Your Name)

vs.

Lorie Davis, Dir. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Fifth Circuit Court of Appeals in New Orleans Louisiana
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Ricky Lee Stroble
(Your Name)

French M. Robertson 12071 F.M. 3522
(Address)

Abilene Tx. 79601
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. Does Actual Innocence excuse a failure to properly brief an appeal in a Certificate of Appealability proceeding?

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LIST OF PARTIES

[X] 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:

TABLE OF AUTHORITIES CITED

CASES — PAGE NUMBER

STATUTES AND RULES

OTHER

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

[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[X] is unpublished.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[X] is unpublished.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[ ] is unpublished.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[ ] is unpublished.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 June 12th 2018 / EN BANC Rehearing denied 7-20-18

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: A, and a copy of the order denying rehearing appears at Appendix B.

[ ] 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 Oct 14th 2015. A copy of that decision appears at Appendix C.

[ ] 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

1. Equal Protection under the Fourteenth Amendment
2. Federal Rules or Appellate Procedure, Rule 35(b)(1) petition for en banc rehearing.
3. Article 11.07 of the Texas Code of Criminal Procedure.
4. 28 USC §2254

STATEMENT OF THE CASE

Petitioner Ricky Lee Stroble, TDCJ#1584772 is currently serving a 99 year sentence for aggravated sexual assault of a child and a concurrent twenty year sentence for indecency with a child by sexual contact. Stroble convicted in Texas attempted to file a state writ attacking his conviction in state court pursuant to the Texas Code of Criminal Procedure 11.07. However, unknown to the pro se, indigent petitioner there existed a rule that required the intermediate court of appeals in the state to issue a "mandate" prior to his filing his state writ of habeas corpus. However, this was dismissed and the Clerk of the Court of Criminal Appeals did not explain or inform him that this writ was dismissed as being filed "too early"!

After a seris of attempts to learn the fate of his petition he filed in 2015 a writ of habease corpus in fieeral court not being an attorney he did not under understand whent he COA was GRANTED that he was to file an additional brief explaining the issue of the denial of a hearing at the U.S.D.C..

Stroble argues that the body of case law that exists allows all of these errors to be waived if he makes a credible showing of actual innocence. His argument stems from the fact that even though he was forced to admit guilt in the plea agreement in state court, no evidence was ever submitted that supported a guilty plea. And, from a careful reading of the progress of the questioning of the "victim" it is plain that she was coached into the admission by repeatedly hounding her into the belief that Stroble had done something to her.

REASONS FOR GRANTING THE PETITION

Petitioner Ricky Lee Stroble(herein Stroble) asks that the court consider first and foremost his claim of actual innocence and in due course evaluate the question of which if any errors that a petitioner makes that would be excused for cause under the consideration of actual innocence?

Stroble brings this claim under the standard of Schlup v. Delo 115 S.Ct. 8512 (1995), specifically he argues that he did not have sexual/anal/oral intercourse with the victim S.H. Yet all of the statements made by S.H. are based around the notion that Stroble had intercourse with her while she "was asleep". This begs the question if this is true how did she know about it?

Actual Innocence cases impact not merely the individuals who file petitions but the thousands of people who are awaiting trial and look to the court system for guidance. This body of law is not static but rather evolving and developing, in terms of it's definitions of what it can and cannot be used for. In this specific case Stroble argues that evidece exist to expand that defintion and clairfy when the actual innocence gateway can and cannot be used.

R.O.A. 16-20442.1703 is a transcript of S.H.'s interview with Clinician Lisa L. Bourgoyne M.Ed, LPC-S note that the top of the page states that at the time of referral "Sauvauna had not disclosed sexual abuse" yet she states later during the interview that; "They said they found pictures on his computer of him doing things to me." ROA 16-20442.1706 lines 16-20. And,

And, in another reply S.H. stated "Because they told me" ROA 16-20442. 1077 near the bottom of the page. Explaining how she knew that she had been sexually assaulted. But, note that S.H. never claimed to have first hand knowledge that Stroble had sexually assaulted her.

At the trial the D.A. admitted various photographs and asserted that there were photos that demonstrated sexual assault of S.H.. But all of the ones profferred to the court are extreme close-ups of things like a penis touching a girls leg or a man's hand touching a small breast. Simply put these are commerically prepared photos available on the internet. None show Stroble's face or any part of S.H.'s body.

Under the Texas law in cases of sexual assault an "outcry" witness is a crucial part of the Code of Criminal Procedure process. Yet, in this case there is no such witness. Which is why, there were three attempts to take S.H. to a different child "forensic interviewer" and have her verbally state what had occurred, or what they wanted to her to say had occurred. It appears that from reading the interviews ROA 16-20442.1995 that in each case the interviewer asks "leading or suggestive" questions and trys to get S.H. to admit to having sex with Stroble at his residence. These interviews took place over an 18 month while Stroble was in jail. Stroble points out that this testimony was not only crucial to the plea agreement but also was the basis of obtaining an indictment which conferred jurisdiction upon the trial court.

In essence, there was no "outcry" stating that she and

and Stroble had sexual intercourse of any kind. made to the initial police examiners, or the S.A.N.E. nurses, or "Scotty's House" interviewers, nor the last interviewer Lisa Bourgoyne. In fact, it is reasonable to discount her testimony at the plea bargain altogether as Dr. Ferrera has stated in the case of Kirby v. State 208 S.W.3d 508 (2006) that it is possible for a child to make a false statement and then come to believe that statement through repetition of the therapy session." It should be noted that Dr. Ferrera is considered the definitive authority of issues related to child psychological issues involving sexual assault and interviewing witnesses for trials related to these topics.

Stroble's attorney related that counsel did inform him that S.H. "would not say anything" until after he was fired from Stroble's case. Then after being re-hired trial counsel told him that in fact S.H. had made a statement against him.

Stroble argues that his claim of actual innocence is in fact substantial enough to act as a gateway for review of the errors below in the USDC and Fifth Circuit Court of Appeals.

At the U.S.D.C. Stroble was told that his initial filing of the §2254 was blocked by the A.E.D.P.A. one-year time limit. To understand this a bit of history is necessary, the intermediate state appellate court affirmed both convictions See Stroble v. State No. 01-09-00886-CR and 01-09-00887-CR, 2011 WL 1631812 (Tex.App.- Hou. [1st Dist] 2011, pet ref'd). On September 28th 2011 the Texas Court of Criminal Appeals refused

Stroble's corresponding petitions for discretionar review (PDR) ROA .1026. Stroble did not file a petition for writ of certiorari with this court. Therefore his A.E.D.P.A. time began to run on December 26th 2011. However, Stroble had no intention of being late on his application and filed his state writ petitions on December 19th 2011 attacking both convictions.

However, a document called the "mandate" had not issued from the intermediate court. Despite the fact that Stroble had filed his state writ petitions according to the statute and the best advice of appellate counsel. He had done so without knowing that the trial court had no jurisdiction to entertain an application. See Ex Parte Johnson 12 S.W.3d 472, 473 (Tex.Crim. App. 2000) showing that the trial counsel does not have jurisdiction until the mandate issues.

On April 23rd 2012 Stroble submitted two additional state habeas form applications, on which he modified each respective cover page by adding the words "first amended" to the documents these are the 2012 "amendments". ROA 1168, 1436. PLEASE NOTE when these went to the trial court and on to the Court of Criminal Appeals neither court informed him that the initial filing was without jurisdiction and no longer pending. No information whatsoever was given to Stroble regarding the fate of these initial documents or the amendments being improper as the initial filings being stricken.

The District Clerk of the State Court instead filed these as "amendments" to his 2011 application which had been dismissed on February 15 2012. The forwarded them to the Court of Criminal

(C.C.A. herein) ROA 1165-66, 1433-34 And, it is agreed that no further action was ever taken on these applications.

This court has held that not all people are equal in all situations "an equal protection cliam may be based on selective enforcement of a governmental policy or program when compared to others similarly situated..." Moreso the ability to submit a writ on the first occasion is a fundamental right and when issues of equal protection impact such a right than the court should review the denial of such under "strict scrutiny" see Rubble v. Fleming 160 F.3d 213(5th Cir. 1998).

Being at a total loss to understand why his applications never even recieved the C.C.A.'s standard postcard denial that so many of the others had recieved and therefore essentially clearing the way to file a writ in federal court, Stroble began to write letters to the Clerk of the trial court and the Clerk of the Court of Criminal Appeals. None of these were answered. So in 2105 Stroble filed another amended writ of habeas corpus which he hoped would be answered.

Stroble argues that he should have equitable tolling made available to him under the unbrella of the Actual Innocence provisions of habeas corpus law and the fact that there were many impediments to being heard that denied him the ability to present his arguments. As section (b) to the §2254 allows tolling if there were govermentcreated impediments to filing Stroble will present these individually so that each may be argued specifically. IMPEDIMENT#1 Stroble asked that his initial writ be unfiled as he was not the author of the inital brief but rather a third party had presented it without all of the errors that Stroble

wanted to present. The Clerk of the trial court stated that his writ application could not be unfiled which is neither the law nor practice of the counts of Texas. Texas Code of Criminal Procedure 1.025 titled "Signed Pleadings of the Defendant" requires that pleadings must be signed by an attorney of record or the defendant if he is acting pro se. The fact is that this initial writ appliction was submitted not by Stroble in 2011 but rather by John Pizer a private investigator in Arizona. When Stroble attempted to withdraw this application rather than telling him that it had been dismissed pending the issuance of a mandate, he was told simply that he could not withdraw the application. Stroble argues that because it was not signed in accordance with the law of Texas it should not have been reviewed by the trial court. And, at the time of his initial inquiry it had not been forwarded to the C.C.A.

When no specific rule in the Code of Criminal Procedure addresses an issue like "amending" an application then Rule 39.04 is used to allow Rules of Civil Procedure to address an issue, usually under discovery. In this case Rule 162 of the Rules of Civil Procedure "Dismissal or non-suit" is controlling and would have allowed Stroble to "unfile" or dismiss the improper application. In order that he could have properly amended the writ application and this can be done "At any time before the Plaintiff has introduced all of his evidence other than rebuttal evidence the Plaintiff may dismiss." See Rule 162.

Texas Courts are not in dispute about either amendment or dismissal. Yet this clerk seemingly treated Stroble different as he was pro se or indigent.

wanted to present to the trial court for review. But because this application was not signed by Stroble nor his attorney of record Stroble argues it should not have been even reviewed by the trial court nor sent to the court of criminal appeals. Moreso Stroble argues that he should have been allowed to amend this initial writ application as at the time it was the source of inquiry it had not been forwarded to the court of criminal appeals.

When no specific rule in the Code of Criminal Procedure addresses an issue like "amending" an application then Rule 39.04 is used to allow Rules of Civil Procedure to address an issue, usually under discovery. In this case Rule 162 of the Rules of Civil Civil Procedure "dismissal or non-suit" is controlling and would have allowed Stroble to "unfile" or dismiss the improper application. In order that he could have amended, "At any time before the Plaintiff has introduced all of his evidence other than rebuttal evidence the Plaintiff may dismiss." See Rule 162

Texas courts have rule on questions of amendment and allow such changes.

IMPEDIMENT #2 The clerk of the trial court, 506th Judicial District created a false impression by telling Stroble in another separate letter that a writ application could not be amended. See Green v. State 37 S.W.3d 434, 453 (Tex.Crim.App. 2012); Accord Ex Parte Thompson Wr-68, 871-03 (Tex.Crim.App. 09-06-15) unpub. "Nothing in 11.07 precludes applicant from filing supplemental claim while his appeal is pending." Which is what Stroble attempted to do in order that his claims could be heard. This false impression lingered when months passed with no ruling from the Court of Criminal Appeals was transmitted to him.

IMPEDIMENT #3 The Texas Court of Criminal Appeals dismissed both writs of habeas corpus because the mandate had not issued. But failed to notify Stroble in a clear and communicative way that a lay person to the law would understand. Moreso, the A.G. admits that it is in doubt that a card was ever sent to Stroble. BUT, if it did would it have merely said PENDING as the C.C.A. wibsite indicated was the case, which was also part of the e-mails sent to Stroble.

IMPEDIMENT #4 The court appointed counsel that represented Stroble on direct appeal failed to notify him about the existence of a mandate. He did inform Stroble about the affirmation of the Petition for Discretion Review (P.D.R. herein) and the option of a Writ of Certiorari and the fact that had one year under the now familiar A.E.D.P.A. deadline to file a federal writ of habeas but was given no notice at all about the existence of a "mandate" and having to wait to file his state writ of habeas corpus under the §11.07 statute.

Stroble argues that individually and collectively each of these impediments created by state action delayed the filing of his state writ of habeas corpus and invites the court to review the record for a fuller understanding.

Stroble points out that he and the A.G. agree that there was a distinct lack of communication from the Clerk of the Court of Criminal Appeals. Noting that Stroble wrote on 5-26-16, 7-27-16, 8-9-16 and 3-16-15. The A.G. takes issue with the idea that Stroble "slept" on his rights and neglected to write to the Clerk of the court during 2016. Stroble argues that since letters did not gain any rational response he instead contacted others outside of the system in 2014 and asked them to check the court's website and e-mail the court trying to learn the fate of his writs.

Various affidavits were sent with the petition for Certificate of appealability submitted to the honorable Fifth Circuit Court of Appeals but in fact the court refused to review the evidence as it was "outside the record." However, Stroble is of the notion that the affidavits are still in the record of the Clerk of the Court for the Fifth Circuit they were simply not presented to the Court.

Moreso, Stroble asks the Court to take notice that problems in communcating with the Clerk of the Court of Criminal Appeals are routine and common. So much so that other cases have addressed the issue. See Nelson v. Thaler 2010 U.S. Dist. Lexis 116875;

and Phillips v. Donelly 216 F.3d 508 (8th Cir. 2000).

Stroble attmpted to explain that he could prove that he did attempt to gain a resolution on the writ of habeas corpus. Pointing out that all incoming and outgoing mail that is catagorized as "legal mail" is logged and a record kept of it and where it was sent to and from. But he admits that he did not, owing to his poverty in prison include a self addressed stamped envelope to be certain it would not cost the court to reply.

Stroble contacted Mr. Steve Cotes who runs a non-profit called Tiers and his pen-pal Mr Mark Johnson and asked both of them to contact the Clerk of the Court of Criminal Appeals. It is these individuals who supplied the affidavits that Stroble asks the court to forward for review.

Instead of giving a detailed reply explaining that Stroble had filed the applications ahead of the mandate the Clerk of the Court had instead provided an e-mail to both Mr. Johnson and Cotes as well as to Stroble. These e-mail replies were a grid with a notation of when each writ had been filed and the odd note dis.miss.app with no other explanation. Stroble quieried Law library correctional officers, jailhouse lawyers and anyone else that would listen trying to figure out what it meant. Finally on 4-15-15 a clear and explicit letter came from the clerk and clued him in on the technical aspect of the appeal/writ process telling him what a "mandate" was and how it impacted his applications

Stroble being pro se had attempted to study the law to learn how this applied to habeas and was confused by Texas published cases which held "habeas corpus is an extraordinary remedy and is not a substitute for an appeal." In re Hace 65 S.W.3d 332 (Tex.App Amarillo 2001) further this e-mail was not from some lay-man but from the Clerk of the Court of Criminal Appeals who should have known that the average person has no understanding of what a "mandate" means in terms of the ability to submit a habeas application to the court.

In conclusion, Stroble points out that this entire set of issues requires someone of experiance and background in the law yet none were available to him. Instead, he has attempted to act as his own attorney and get the errors into the attention of

the courts in the hope of having the errors reviewed. I understand that the chance of review is almost non-existent but considering how this is essentially a death sentence, owing to the fact that Stroble was convicted in his late 30's and will not be eligible for parole until he is in his 70s he has only hope.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Ricky Stroble 1594772

Date: 9-19-2018