NO. 005186

ORIGINAL

IN THE SUPREME COURT
OF THE
UNITED STATES

Supreme Court, U.S.
FILED
JUL 14 2000
CLERK

OCTOBER TERM 1999

KENNETH RANDALL WITHERS,
petitioner ...

VS.

THE STATE OF TEXAS,
Respondent ...

PETITION FOR WRIT of Habeas
CORPUS
TO THE 179th JUDICIAL DISTRICT COURT
OF HARRIS COUNTY TEXAS

PETITION FOR WRIT of
Habeas CORPUS

KRW #687233
Kenneth Randall Withers
2101 FM 369 North
Iowa Park, TEXAS
76367

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SUPREME COURT, U.S.

QUESTIONS PRESENTED

1. When a state court JUDGE designates the issue for Review Regarding whether the prosecution introduced improper / false evidence and the state Respondent then fails to deny the allegation in the answer, does this failure constitute an admission ? [see page 11]

2. When the prosecution discloses exculpatory evidence to a standby counsel Rather than to the pro se defendant personally, and standby counsel then fails to disclose this evidence to the pro se defendant, and the lack of Knowledge by the pro se defendant then leads into the introduction of false evidence, can the prosecution thereafter properly contend that their disclosure duty is met? [see page 15, 25 @ footnote 6]

3. Where the actual perpetrator of the crimes has confessed and corroborated fact that an actually innocent petitioner has been convicted with False evidence due to that actually innocent petitioners exclusion from discovery and the petitioner has diligently pursued his claims; is this petitioner entitled to an evidentiary hearing to terminate his manifested miscarriage

of Justice? [see pages 14-18]

4. Does the Facts presented in this case warrant a de novo review by The Supreme Court with Respect to the explicit language articulated @ mcKaskle v. Wiggins, 465 U.S. 179, in Regards to pro se presence and standby counsels participation outside the Jurys presence? [see pages 24-27]

5. With Respect to the Supreme Courts holding in Berger v. United States, 295 U.S. 78, 88 S.Ct. 629, 633; which depicts the prosecutions duty as a servant of the law whom possesses a duty not to allow innocent suffer; when the wrongly convicted, actually innocent, and wrongly incarcerated, prisoner whom produces a significant showing of this "miscarriage of Justice" which clearly occurred due to constitutional violations that occurred in the underlying state trial mechanism; ..... Does the Berger language supra invoke the Due Process clause of the Fourteenth amendment which would Require the prosecution to act, and if so, with Respect to both the state Judicial and Executive Branches of Government, what is the defined obligation of this duty in Respect to the ends of Justice?

JURISDICTION Statement

This instrument is filed with the jurisdiction of this court invoked pursuant to 28 U.S.C. §§ 2241; 2254. It should be noted that this is an extraordinary matter which simultaneously may at the courts discretion invoke 28 U.S.C. § 1651(a). SEE Felker v. Turpin, 518 U.S. 651, 116 S.Ct. 2333, N.1, 2338-39 (1996).

The TEXAS COURT OF CRIMINAL Appeals in Ex Parte Withers, WRIT NO.S 21,274-04; 21,274-05, denied Requested Relief in cause NO.S 9400215A, 9400454A, upon the trial court findings without hearings, on June 9, 1999. She additionally denied WRIT NO. 21,274-03, Ex Parte Withers, cause NO. 9400455, on June 2, 1999, without a WRITTEN ORDER, as a subsequent WRIT.

The United States Court of Appeals for the Fifth CIRCUIT, in No. 99-20640, denied petitioners motion which sought authorization for consideration of a second 28 U.S.C. § 2254 application. This motion was filed pursuant to 28 U.S.C. § 2244 b and was denied on September 10, 1999.

The EXECUTIVE clemency SECTION OF THE TEXAS BOARD OF Pardons and Paroles Refused to consider this case for full pardon, on 4-6-2000, until petitioner achieves compliance with Board Rule 143.2, which Requires the trial officials to unanimously Recommend Full Pardon.

Title I of The Antiterrorism Effective Death Penalty Act of 1996, does not Repeal

the authority of this court to entertain this habeas petition. Exceptional circumstances exist herein that warrant this courts discretionary powers with respect that the petitioner is actually innocent; the actual perpetrator of the crimes has confessed; the state only convicted the petitioner because she utilized false evidence; and today the prosecution admits it utilized false evidence by failing to deny it. However, petitioner cannot obtain an evidentiary hearing without this courts discretionary power and the petitioner cannot obtain relief thru any other forum; court; or the clemency section of TEXAS Goverment.

The jurisdiction of this court is necessary to prevent a complete miscarriage of Justice.

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

The sixth amendment Right to self representation (Faretta Right... see Faretta v. California, 95 S.Ct. 2525 (1975); mcKaskle v. Wiggins, 104 S.Ct. 944 (1984)), has been eroded herein. Petitioner proclaims that Due process and equal protection of the fourteenth amendment has been simultaneously deprieved in this unconstitutional action, in

STATEMENT OF THE CASE

In 1983, this petitioner was found guilty of Robbery. [SEE Appendix A.] There, petitioner received a 75 year sentence and was RELEASED to parole in 1993. Thereafter H. P. D. put out a warrant for petitioners arrest for aggravated Robbery in cause No. 9400215. Thereafter, petitioner was charged in cause No.s 9400454 and 9400455, and these matters were assigned to the 179th judicial district court in Harris County, TEXAS, which is better Known as Houston. An attorney named Sam maida was appointed to the defense but 2 months later withdrew, stating that FRANK Coselli, the complainant in cause No. 9400455, and Vice President of Specs Liquor, was his Cousin. maida stated that an attorney named J. ARMIN Rust, whom had Recently supervised the prosecutor assigned to these cases, ms. LORI Swann, for the Harris County District Attorney, would be assigned to defend petitioner. Immediately Rust and petitioner entered into conflict. This conflict arose with Rust approaching petitioner with intimidation to compel him to plead guilty. When petitioner Refused to plead guilty, Rust brought him before the trial court; prosecutor; and himself, so that the trio could Jointly admonish him that they possessed authority to order consecutive

sentences. In Response, petitioner admonished these parties that he was innocent and would not entertain plea negotiations, while simultaneously he demanded to be present at all pretrial proceedings. [emphasis to clerks Record T.22] and Requested new counsel. The trial court failed to entertain that written motion, yet Rust Responded by U.S. Mail, on may 3, 1994, that the Judge would not Relieve him from duty unless this petitioner could procure funds to hire a private attorney. [see Appendix B] The petitioner did not have the money so his choices for Responsibility for the defense were Rust or himself personally. Petitioner chose what he perceived back then to be a seperate but <u>equal</u> station. [self Representation] Rust was placed into standby counsel status and this was effective in all 3 supra cause Numbers. It then followed that the Judge and prosecutor excluded petitioner from the discovery conference while simultaneously Rust was sent to conduct discovery without petitioner. [Reporters Record, v.3; 68-69] The exclusion was carefully calculated to convict petitioner whom is innocent, with False evidence.

<u>The states case</u> verses <u>The Defense</u>:

STATE witnesses FRANK Coselli and Linda Walker erroneously identified petitioner as the perpetrator. However, simultaneously they stated the actual

perpetrator did not house a mole upon his chin. [Reporters Record, v.3, 112; 142] This is correct, so petitioner shaved and showed the jurors his mole upon his chin. [v.4, 219] Petitioners brother testified that petitioner had this mole on his chin all his life. [v.4, 206] Lynley moreland testified with respect to the mole, in like manner. [v.4, 215] Subsequently, the state responded by introducing their exhibit 7, which is a blue coat petitioner was wearing at the time of his arrest. [v.4, 159] Walker told the jury what she remembered most was that the suspect wore a puffi blue jacket. [v.3, 99] She remembered it well. [v.3, 107] Coselli could not remember the color of the coat. [v.3, 132; 138] The prosecution objected when petitioner asked Deputy Jones, Property Custodian, Harris County Jail, whom delivered this coat for evidence to be utilized against petitioner, "if the coat was a mans coat"? [v.4, 160] However, Ceasar Rivera, Houston Police officer, testified that this coat appeared to be a ladys jacket. [v.4, 201] The prosecutor successfully linked petitioner to this crime with this coat in closing argument. [v.4, 232] This coat is False evidence. Petitioner handled the whole trial in self representation in cause no. 940045S. The jury found him Guilty and the court assessed

punishment as life in The TEXAS Department of Criminal Justice, Institutional Division.

Post Conviction Factual DATA

Rust was assigned to prosecute the appeal. During this timeframe he began to pressure petitioner to plead guilty in cause No.s 9400215 and 9400454 even though he knew clearly that petitioner proclaims innocence, stating: "The sentences would be served consecutively if petitioner Refused to plead." Rust stated that petitioners parole violation time would absorb the time the court issued if he'd plea, while simultaneously Rust admonished petitioner that the assistant district attorney would utilize the same coat to link petitioner to these 2 other crimes he did not commit. Petitioner pled guilty to 2 crimes [cause No. 9400215; 9400454] he did not commit, because the conviction in cause # 9400455 meant that parole in cause No. 377705 [see Appendix A] would automatically be Revoked, and the time therein Remaining would absorb the time received in cause No. 9400454 and 9400215. The conviction in cause No. 9400455 meant that petitioner had to do 30 calendar years to become eligible for parole for something he did not commit. [see ARticle 42.18, section 8, B, 3, V.A.C.C.P. (1994).] Petitioner Knew

the coat he was wearing at his arrest was not part of any crimes but noone else did. As he began to focus upon the reality that the state of TEXAS was going to change his parole eligibility to 90 years, the possibility of those consequences destroyed petitioners ability to go to trial.

upon the eve of the due date that Rust established for petitioner to turn over the prepera-tion of the Rough draft of the appeal brief to Rust secretary for clerical development, Rust and Petitioner spoke by phone. Petitioner was at Harris County JAIL. Inside this conversation, petitioner discovered that Rust had made copies of the Notes he made at the discovery meeting with the prosecution, that petitioner was excluded from while proceeding pro se. That same afternoon, Rust came to the Jail and picked up the brief data and for the 1st time ever he presented petitioner a copy of the Notes he took @ discovery. However, petitioner was transferred that same night to TEXAS PRISON. There, petitioner began to study these Notes. [see appendix C] At page 4 of appendix C, petitioner discovered that the prosecution knew that the coat they introduced [states exhibit 7, cause No. 9400455] could not be part of the crimes [cause No.s 9400215, 9400454, 9400455] be-

cause it has/had No western yoke upon its back. States exhibit #7, [the coat], was utilized by the prosecution to affirmatively link this petitioner to crimes he did not commit, and to intimidate and coerce a guilty plea, while the prosecution and standby counsel jointly (1) Knew this coat was actually false evidence.

The conviction in cause no. 9400455 was affirmed by the 1st Court of Appeals @ Houston on 7-14-95. [id @ 902 sw2d 122 ... P.D.R. Refused] Petitioner then brought a state habeas corpus pursuant to Texas Code of Criminal Procedure, article 11.07, alledging that exculpatory evidence was disclosed to standby counsel whom failed to dislose to the petitioner. Simultaneously, petitioner made a Request to withdraw the pleas in No.s 9400-215 and 9400454. [SEE APPENDIX E] FRED Wilson, Responded for the District Attorney. [see Appendix F] At page 3 therein, he contends that the states disclosure duty was met thru standby counsel, thus No constitutional error exist within the sphere that petitioner was never personally informed while he proceeded pro se.

(1) This Reality is further enhanced with Respect to the actual perpetrators confession wherein he purports to have worn a blue coat [western yoke on back] to commit these three plus one other crime. [See Appendix-D]

This state habeas matter was denied without an evidentiary hearing or written order in Ex Parte Withers, #21,274-02.

On 11-8-96, this petitioner brought civil action #H-96-3850 @, Houston U.S. District Court, a federal habeas petition for this state prisoner. That matter was dismissed without an evidentiary hearing. An appeal was taken to the U.S. Court of Appeals for the 5th Circuit and C.O.A. was granted, limited with Respect to the TRIAL Courts direction that standby counsel attend discovery without petitioner. During this time frame, this prisoner was transferred from The Bill Clements Unit in Amarillo, Texas, to the James Allred Unit where he Resides today, in Texas Prison. Here, He discovered that Heinz Boehmert is the actual perpetrator of the crimes He was wrongly convicted of. This was approximately October of 1997. He admonished the 5th Circuit; the assistant attorney general in charge, Charles Palmer; that He had found the actual perpetrator and that he purports to wearing a blue coat with western yoke on back during the commission of his crimes, within petitioners Request for C.O.A., in No. 97-20782. [See Appendix G] The dismissal was affirmed. id @, 156 F3d 181 [see Appendix H]

It then followed that petitioner filed a subsequent state application for writ of Habeas Corpus. This sole instrument possessed the prosecution of all 3 cause numbers labeled supra. The issues were designated by Judge Wilkinson on march 10th, 1999. [see appendix I] Roe Wilson answered for the Harris County District Attorney on MARCH 25th, 1999. [see appendix J] (2) This petitioner Responded to the states answer on 4-6-99, and correctly stated that Roe Wilson has admitted that the Local Government of Harris County, for the State of TEXAS, has admitted that the state has secured these convictions with False evidence by failing to deny it. Petitioner therein invoked Rule 8(d), Federal Rules of civil Procedure. However, these matter were all denied without evidentiary hearings or written order. [See Appendix K]

The actual perpetrator was transferred to Telford unit in New Boston, TEXAS.

(2) Please Judicially take Notice that the issue on the introduction of "False Evidence" was designated (@) appendix I, section 5; and then Notice that the District Attorney Failed to deny by eliminating that issue from there answer. [SEE Appendix J.]

Pursuant to 28 U.S.C. § 2244[B][3] petitioner then moved the United States Court of Appeals for the Fifth Circuit for Authorization to proceed to the United States District Court for the Southern District of Texas, Houston Division, on a successive writ. This motion was denied on September 10, 1999. [See Appendix L]

On September 16, 1999, Maria Ramirez of The Texas Board of Pardons and Paroles, Executive Clemency Section, Responded to Petitioners Request for Full Pardon. [See Appendix M] On 12-3-1999, Ramirez forwarded additional Full Pardon consideration data. [See Appendix N]

On 2-27-2000, The Governor of Texas, George W. Bush, Responded to this petitioners father whom sent the governor an inquiry with Respect to why the Judicial or Executive Branches of the Texas Government won't act to promote Justice in this matter. Governor George Bush referred this matter to the Chairman of the Texas Board of Pardons and Paroles. [See Appendix O]

It then followed that upon 4-6-2000, Maria Ramirez Responded that petitioner must achieve compliance with Board Rule 143.2 which Requires the Trial Court officials to recom-

mend unanimously, this pardon. [See Appendix P]

CUSTODY

Petitioner is illegally restrained of his liberty in The TEXAS Department of CRIMINAL Justice, Institutional Division, by Respondent, The DIRECTOR - GARY JOHNSON.

STANDARD OF FEDERAL HABEAS CORPUS REVIEW

A Federal habeas petitioner may not obtain Relief with Respect to any claim that was adjudicated on the merits in the state court proceeding unless the decision was contrary to, or involved AN UNREASONABLE application of clearly established federal law, as determined by the Supreme Court; or was based on an UNREASONABLE application of the law to the facts that Reasonable JURIST considering the question would be of one view that the state court Ruling was INCORRECT. DRINKARD v. JOHNSON, 97 F3d 751, 769 (5th CIR. 1996), cert. denied, 117 S.CT. 114 (1997). A determination of a factual issue made by a state court is presumed to be CORRECT, and the petitioner has the burden of Rebutting the presumption by clear and convincing Evidence. 28 U.S.C. § 2254(e)(1) (1996). IN light of the facts and law applied to this case, the determina-

Compare Mooney v. Holohan, 294 U.S. 103, 108 (1935); Thomas v. Goldsmith, 979 F2d 746, 749-50 (9th Cir. 1992).

In this case, the state refuses to answer, and Rule 8(d), Fed. R. Cv. Pro., depicts that this failure is admission. Petitioner is illegally restrained of his liberty and the due process clause of the fourteenth Amendment is designed to protect this individual against this arbitrary action. See Wolff v. McDonnell, 418 U.S. 539, 558 (1974) (citing Dent v. West Virginia, 129 U.S. 114, 123 (1889).) The enforcement of the due process clause of the fourteenth amendment is nullified unless the jurisdiction of the United States Supreme Court now arises and intervenes to ensure that the lower courts comport with American Jurisprudence.

GROUNDS FOR HABEAS CORPUS RELIEF

1. Petitioner is actually innocent, illegally convicted, and incarcerated, in violation of the due process and equal protection clauses of the fourteenth amendment of the National Constitution. [See Appendix D]

2. The due process clause of the fourteenth amendment has been violated because the state convicted petitioner with False EVIDENCE.

3. The petitioners Right to self Representation has been violated with Respect to the counsel clause of the sixth amendment; as well as to the due process and equal protection clauses of the fourteenth amendment.

4. The pleas in cause Numbers 9400215, and 9400454, must be withdrawn as they were involuntarily and illegally obtained in violation of the due process clause of the fourteenth Amendment.

5. The Due Process clause of the fourteenth amendment has been violated because the petitioners parole in cause # 377705 has been Revoked through a finding that petitioner committed the crimes and this decision that petitioner is the perpetrator in cause #'s 9400455, 9400454, and 9400215, are not accurate assessments of petitioners behavior.

GROUNDS

APPLIED TO AMERICAN JURISPRUDENCE

1. The petitioner is actually innocent. This claim is not cognizable absent independent constitutional violations in the underlying criminal proceedings that led to the prisoners conviction. HERRERA v. Collins,

NO. 9400455-A

EX PARTE	§	IN THE 179TH DISTRICT COURT
	§	OF
KENNETH RANDALL WITHERS, Applicant	§	HARRIS COUNTY, T E X A S

RESPONDENT'S ORIGINAL ANSWER

Respondent, the State of Texas, by and through its Assistant District Attorney for Harris County, files this, its original answer in the above-captioned cause, having been served with an application for writ of habeas corpus pursuant to TEX. CODE CRIM. PROC. ANN. art. 11.07, § 2 (Vernon Supp. 1996), and would show the following:

I.

Applicant is confined pursuant to the judgment and sentence of the 179th District Court of Harris County, Texas, in Cause No.9400455-A (the primary case), where Applicant was convicted by a jury for the felony offense of Aggravated Robbery. The court assessed punishment, enhanced by one (1) previous felony convictions, at confinement for life in the Texas Department of Criminal Justice-Institutional Division.

The First Court of Appeals affirmed the conviction in the primary case in an opinion delivered June 15, 1995. **Kenneth Randall Withers v. State**, No. 01-94-00724.

Applicant's now challenges his conviction and sentence alleging that the State improperly withheld exculpatory evidence and that upon his decision to proceed in his trial pro se, he was

Appendix F 5/1/97

denied constitutional rights guaranteeing due process of law and equal protection.

II.

Respondent denies the factual allegations made in the instant application for writ of habeas corpus except those supported by official court records.

REPLY TO APPLICANT'S FIRST GROUND FOR RELIEF

In his first proposed ground for relief, Applicant complains that at his trial the State did not disclose that a description of Applicant provided by witnesses to the offense described him as wearing a blue jacket with a western-style yoke on the back. When Applicant was arrested, he was indeed wearing a blue jacket. However, the jacket he wore had no such western-style yoke. Applicant contends that the description of the jacket was exculpatory evidence improperly withheld by the State.

The Court of Criminal Appeals has established a three-part test for determining whether a defendant's due process rights have been violated by a failure to disclose evidence: (1) Has there been a failure to disclose evidence? (2) Is the evidence favorable to the accused?; (3) Does that evidence create a probability sufficient to undermine the confidence in the outcome of the proceeding?. **Ex parte Mitchell**, 853 S.W.2d 1, 4 (Tex. Crim. App. 1993). Applicant's claim for relief fails on all three levels.

During the prosecution of the charges against Applicant, the State maintained an open-file policy. As such, the information Applicant complains was withheld was in fact freely disclosed. **See**

Appendix F

Having shown no error, Applicant's first ground with relief is without merit and should be denied.

REPLY TO APPLICANT'S SECOND GROUND FOR RELIEF

In his second proposed ground for relief, Applicant complains that he was allowed to exercise his constitutional right to self representation. **See Johnson v. State**, 676 S.W.2d 416, 418 (Tex. Crim. App. 1984). Apparently, Applicant contends that because he chose to represent himself, he was unconstitutionally denied the opportunity to pursue any future claim of ineffective assistance of counsel. However, it is settled law that a defendant's decision to proceed *pro se* does not amount to an unconstitutional forfeiture of the right to effective representation. **Faretta v. California**, 422 U.S. 806, 834 n. 46, **Withers v. State**, 902 S.W.2d 122, 127 (Tex. App.--Houston [1st Dist.] 1995, no pet.); **Rodriguez v. State**, 763 S.W.2d 893, 896 (Tex. App.--San Antonio 1988, pet. ref'd). "[Applicant's] choice to represent himself was in essence a decision to forego the constitutional right to effective assistance of counsel." **Withers**, 902 S.W.2d at 127.

Ignoring his decision to forego any claim of ineffective assistance of counsel, Applicant now contends that counsel appointed to assist in pre-trial discovery failed to reveal information regarding the style of the jacket as described by witnesses to the robbery for which Applicant was arrested. As discussed above, any such alleged information would have had no effect on the outcome of Applicant's trial. As such, Applicant's claim of ineffective representation is not only waived, it is

Appendix F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
AUG 04 1998
CHARLES R. FULBRUGE III
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No. 97-20782
Summary Calendar

KENNETH RANDALL WITHERS,

Petitioner-Appellant,

versus

GARY L. JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. H-96-CV-3850

Before JOLLY, SMITH and WIENER, Circuit Judges.

PER CURIAM:*

In this appeal from the denial of 28 U.S.C. § 2254 habeas corpus petition, this court granted Kenneth Randall Withers, a Texas prisoner (# 687233), a certificate of appealability ("COA") with respect to "the issue whether the trial court's direction that [Withers'] standby counsel attend a discovery meeting without Withers violated his right to self-representation."

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Appendix H

In 1994, Withers was convicted by jury of aggravated robbery after being granted the right to proceed pro se with standby counsel. Withers has failed to demonstrate that standby counsel "substantially interfere[d] with any significant tactical decision" on Withers' part, see McKaskle v. Wiggins, 465 U.S. 168, 178-79 (1984), when the prosecution before trial allegedly disclosed to standby counsel information that the robbery suspect wore a jacket with a "western yoke," and standby counsel in turn failed to convey this information to Withers. The judgment of the district court is AFFIRMED.

Withers' "Motion of Request for Additional Relief" is DENIED.

AFFIRMED; MOTION DENIED.

Appendix H

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-20640

U.S. COURT OF APPEALS
FILED
SEP 10 1999
CHARLES R. FULBRUGE III
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IN RE: KENNY WITHERS,

Movant.

Motion for an order authorizing
the United States District Court for the Southern
District of Texas to consider
a successive 28 U.S.C. § 2254 application

Before SMITH, BARKSDALE, and DENNIS, Circuit Judges.

BY THE COURT:

Kenneth Randall "Kenny" Withers, Texas prisoner # 687233, has filed a motion in this court for an order authorizing the district court for the Southern District of Texas to consider a second or successive 28 U.S.C. § 2254 application in accordance with 28 U.S.C. § 2244(b)(3)(A) and (B). Withers' motion for appointment of counsel is DENIED.

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a second or successive § 2254 application must be certified by this court as provided in 28 U.S.C. § 2244 to contain either newly discovered evidence or a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, which was previously unavailable. § 2244(b)(2)(A), (B). If the movant alleges newly discovered evidence, he must show that the factual predicate for the claim

Appendix
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could not have been discovered through the exercise of due diligence; and that such facts would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense. § 2244(b)(2)(B). This court may authorize the filing of a successive habeas corpus application only if it determines that the movant makes a prima facie showing that the motion satisfies the applicable requirements. § 2244(b)(3)(C).

Withers claims "actual innocence" based on the allegedly newly discovered evidence of a confession by the actual robber. However, Withers does not assert any constitutional error which prevented him from discovering this evidence. "Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." Herrera v. Collins, 506 U.S. 390, 400 (1993). Withers has not identified a constitutional error associated with his claim of newly discovered evidence.

Because Withers has failed to make the requisite showing for authorization to file a successive § 2254 application, his motion is DENIED.

Appendix L