ORIGINAL

CAUSE NO. 00-6931

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2000

Supreme Court, U.S.
FILED
SEP 15 2000
OFFICE OF THE CLERK

EX PARTE CHARLES

PETITION FOR AN EXTRAORDINARY WRIT OF HABEAS CORPUS
UNDER THE AUTHORITY OF SUPREME COURT'S
RULE 20

UNITES STATES COURT OF APPEALS FOR FIFTH CIRCUIT

NAME OF COURT THAT LAST RULED ON MERITS OF CASE

PETITION FOR EXTRAORDINARY WRIT OF HABEAS CORPUS

Shirley A. Charles, pro-se
TDCJ-ID #692618
Mountain View Unit
2305 Ransom Road
Gatesville, Texas 76528

QUESTIONS PRESENTED

1. Did the United States Court of Appeals Fifth Circuit offend the Due Process of Law Clause and the Equal Protection of the Law Clause of the Fifth and Fourteenth Amendments of the United States Constitution when it denied state petitioner leave to file a successive habeas petition?

2. Whether, a state prisoner, under the provisions of the Due Process of the Law Clause as guaranteed under the Fourteenth Amendment of the United States Constitution, Title 28 U.S.C. §2254 habeas application was time barred by the applicable statute of limitation under the provisions of the Antiterrorism and Effective Death Penalty Act amended as Title 28 U.S.C. §2244(d)(10(C)?

3. Whether a state prisoner, under the provisions of the Due Process of the Law Clause of the Fifth and Fourteenth Amendments of the United States Constitution, who plead **not** guilty to the offense of using a firearm, is entitle to make a showing of actual innocence in light of this Supreme Court's ruling in Bailey v. United States, 516, U.S. 137, 144, 116 S.Ct. 501, 506, 133 .Ed. 2d 472 (1995), in the standards of this Supreme Court's ruling in Bousley v. United States, 523 U.S. 614, 118 S.Ct. 1604 140 L.Ed.2d 828 (1998)?

4. Was the trial court's charge to the jury fundamentally defective denying petitioner of her rights to a fair and impartial trial as guaranteed under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution?

5. Did the Ninth District Court of Appeals at Beaumont, Texas, induce a miscarriage of justice when denying petitioner's appeal thus, violation her rights as guaranteed under the amended Fifth, Sixth, and Fourteenth Amendments of the United States Constitution?

5. Why the Extraordinary Writ of Habeas Corpus should issue in light of this Supreme Court's ruling of Williams v. Taylor, 120 S.Ct. 1479 (2000); and also Williams v. Taylor, 120 S.Ct. 1495 (2000) pursuant to the Fourteenth Amendment of the United States Constitution of due process and equal protection of the laws?

LIST OF PARTIES

THE STATE OF TEXAS

§

THE TEXAS BOARD OF PARDONS AND PAROLE

§

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

CAUSE NO._____

IN

THE SUPREME COURT OF THE

UNITED STATES OF AMERICA

EX PARTE CHARLES *

REVISED PETITION FOR

EXTRAORDINARY WRIT OF HABEAS CORPUS

UNDER THE AUTHORITY OF

SUPREME COURT'S RULE 20

TO THE HONORABLE JUDGE(S) OF SAID COURT;

NOW COMES, Shirley Ann Charles, petitioner [here-in after-referred to as Charles], in a pro-se fashion and manner, petitioning this Court for an EXTRAORDINARY WRIT OF HABEAS CORPUS pursuant to Title 28 U.S.C. §2254(a), under the authority and capacity of this Supreme Court's Rule 20. As such, Charles, will thus show this Honorable Court the following;

II.

ADEQUATE RELIEF CANNOT BE OBTAIN

IN ANY OTHER FORM OR

FROM ANY OTHER COURT

Charles, filed a motion under the provisions of the Antiterrorism and Effective Death Penalty Act of 1996, amended as Title 28 U.S.C. §2244(3)(A)(B)(C). Said motion was denied in the Fifth Circuit Court of Appeals on January 11, 2000.

The denial of said motion has barred Charles from seeking further relief as pursuant to §2244(3)(E) that states in pertinent parts;

> "The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be subject of a petition for rehearing or for a writ of certiorari."

WHEREFORE, Charles prays, this Court will issue said EXTRAORDINARY WRIT OF HABEAS CORPUS pursuant to Title 28 §2254(a) under the authority and capacity of this Supreme Court's Rule 20, to be in aid of this Court's appellate jurisdiction to review the courts below decisions in this case and cause, as said decisions conflicts with decisions of other United States Court of Appeals and lower courts of same important matters; an has so far departed from the accepted and usual course of judicial proceedings, and thus, warrants the exercise of this Court's discretionary powers to issue said writ to determine Charles could not obtain adequate relief in any other form from any other court as follows, to-wit;

STATEMENT OF THE CASE

Charles, is illegally confined and restrained of her liberty by the Texas Department of Criminal Justice-Institutional Division pursuant to a judgment of a state court based on **no** evidence to support the charge to the jury. Charles, challenges that simple possession does **not** in it self substantiates a conviction under statutes which criminalizes "use" for an affirmative finding of "use" of a deadly weapon, to-wit; a firearm, and the mere fact that contraband is discovered at the residence will not, without, more, provide evidence sufficient to support a conviction based on constructive possession against Charles. (See Appendix A).

On January 11, 1994, Charles, was one of two individuals charged with the offense of possession of controlled substance from the execution of a search warrant on a residence in Beaumont, Texas. A firearm was confiscated from underneath a sofa cushion in a back bedroom where money, and drugs were found.

On May 20, 1994, Charles was indicted only for the offense of possession of a controlled substance. On July 14, 1994, Charles, was re-indicted for possession of a controlled substance (the original charge), yet, in the superseding indictment, the State alleged, "...in the course of the same criminal episode, the Defendant, 'used' a deadly weapon, to-wit; a firearm."

Following a plea of **not** guilty Charles, was tried by a jury and was found guilty - as stated in the indictment - the verdict does **not** reflect a special issue as being presented to the jury affirming the defendant was guilty of "using" a deadly weapon, to-wit; a firearm, during the course of the same criminal episode.

A punishment of forty (40) years, without good time earning status was rendered, as the affirmative finding of "use" of a deadly weapon, to-wit; a firearm, was used in the commission of the crime was entered in the judgment.

Charles, has exhausted all adequate and currently available state remedies in the following manner;

Charles, appealed her conviction to the Ninth District Court of Appeals at Beaumont, Texas, presenting one ground of error;

"The trial court erred by entering an affirmative finding that Appellant "used" a deadly weapon because there was insufficient evidence to support the affirmative finding."

The conviction was affirmed on February 7, 1996, and became known as Charles v. State, 915 S.W.2d 238 (Tex.App.-Beaumont 1996). (See Appendix B).

A Petition for Discretionary Review was filed and refused on May 1, 1996, raising the following;

a) The Court of Appeals has erred in holding that evidence was sufficient to support affirmative finding that Appellant "in the same criminal episode 'used' a deadly weapon."

b) Appellant was denied due process of law by prosecution's selectiveness to re-indict Appellant adding the deadly weapon language to re-indict.

c) The charge to the jury was calculated to injure the right's of Appellant and denied the Appellant of having a fair and impartial trial.

d) The Court of Appeals quoted Bailey v. U.S., 116 S.Ct. 501 (1995) out of context, and failed to apply the analysis in the case.

Charles, first state post-conviction writ pursuant to Texas Code of Criminal Procedure V.A.C.C.P. art. 11.07 was filed and was denied without written order on March 26, 1997, raising the following issues;

a) The Beaumont Court of Appeals erred in holding; there was evidence to support the affirmative finding, "...in the course of the same criminal episode, the defendant 'used' a deadly weapon, to-wit; a firearm." Thus, violating petitioner's Equal Protection, Due Course, and Due Process of Law, as guaranteed under Article I, Section §§§ 3(a), 10, and 19 Amendment under the Texas State Constitution, as well as the 5th, 6th, and 14th Amendment rights of the Constitution of the United States, and

b) The trial court's charge was fundamentally defective to the jury which denied petitioner of her rights to Due Process in violation of the 14th Amendment of the United States

Constitution. Thus, denying petitioner of a fair and impartial trial.

Charles, filed a motion to the trial court raising the same issues pursuant to Texas Code of Criminal Procedure V.A.C.C.P. art. 11.07. It was also denied without written order April 1, 1998.

A third state post-conviction writ was filed and dismissed as subsequent application for writ of habeas corpus, pursuant to art 11.07, sec. 4 V.A.A.C.P., June 10, 1998, raising the following;

a) The elements of the indictment in this cause regarding "use" were not proven beyond any reasonable doubt. As the record of the trial clearly support this claim and contention. As there is testimony by State's witnesses that the firearm itself was found under a sofa cushion. Thus, the firearm found under a sofa cushion could not be termed as evidence of "use". Thus, the record is devoid of any and all evidence of use.

b) The counsel and attorney that represent the applicant at the pre-trial and trial stages and the appellate stages of this case and cause, was incompetent and ineffective and in so doing thus violated the Constitutional rights of the applicant Charles. As being

ineffective as counsel, this violated the 6th Amendment Clause, Constitutional guarantees of the United States Constitution, and Article I, section 9 and 10 of the Texas Constitution.

c) There is a fatal variance between the indictment and the jury charge in that the indictment alleges as an element "use" of firearm while there was never any type of evidence entered into the record of the trial to indicate, prove, proffer, that the applicant Charles, ever, "used" or exhibited a firearm as charged to the jury in this cause. This is a fundamental error of the court, requiring reversal and remand for a new trial.

b) The applicant Charles, was thus denied a fair and impartial trial, in direct violation of the applicant's Constitutional mandated and guaranteed rights to a fair and impartial trial under the 6th and 14th Amendments, U.S.C.A., United States Constitution. As due to a combination of ineffective assistance of counsel, and a fatal variance between the jury charge and the elements of the indictment that were not proven beyond any reasonable doubt.

On December 14, 1998, Charles, filed her first federal habeas petition pursuant to Title 28 U.S.C. §2254 in the United

States District Court for the Eastern District of Texas, Beaumont, Division, presenting the following;

a) The Beaumont Court of Appeals erred in holding there was evidence to support the affirmative finding, "...in the course of the same criminal episode, the defendant 'used' a deadly weapon, to-wit; a firearm." This violated petitioner's Equal Protection, Due Course, and Due Process of Law as guaranteed under Article I, §§§3(a), 10, and 19th Amendment under the Texas Constitution, as well as the 5th, 6th, and 14th Amendments of United States Constitution.

b) The trial court's charge was fundamentally defective to the jury which denied petitioner of her rights to Due Process in violation of the 14th Amendment of the United States Constitution and Due Course under the Texas Constitution, petitioner was denied a fair and impartial trial and effective assistance of counsel.

On December 28, 1998, the Honorable Federal District Judge Richard A. Schell, reviewed said petition and **dismissed** it as being time barred by the applicable one year statue of limitation pursuant to Title 28 U.S.C. §2244(d). (See Appendix C).

A request for Certificate of Appealability to the Federal District Court was denied. (See Appendix D).

Charles, appealed to the United States Court of Appeals Fifth Circuit to issue a Certificate of Appealability, as well as motioning for reconsideration and a motion to amend motion for reconsideration, and thus, were all denied for the reasons stated in the findings and conclusions previously adopted in cause number 1:98-cv-2041. (See Appendix D).

Finally, Charles, filed a motion under the applicable statue of Title 28 U.S.C. §2244 (3)(A)(B)(C) for an order authorizing the federal district court to consider a successive habeas petition, to make a showing of actual innocence in light of the Supreme Court's ruling in Bailey, v. U.S., 516 U.S. 137, 144, 116 S.Ct. 501, 506, 133, L.Ed.2d 472 (1995).

The Fifth Circuit Court of Appeals denied Charles' motion on January 11, 2000. (See Appendix E).

With all things considered this Honorable Court should issue said EXTRAORDINARY WRIT OF HABEAS CORPUS pursuant to Title 28 U.S.C. §2254(a), and the authority as provided for as adopted under Supreme Court's Rule 20 to discuss the following, to -wit;

GROUNDS FOR RELIEF

I.

DISCUSSION

Did the United States Court of Appeals Fifth Circuit offend the Due Process of the Law Clause and the Equal Protection of the Law Clause of the Fifth and Fourteenth Amendments of the

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
SEP - 8 1999
CHARLES R. FULBRUGE III
CLERK

No. 99-40079
USDC No. 1:98-CV-2041

SHIRLEY A. CHARLES,

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 Eastern District of Texas

O R D E R:

Shirley A. Charles, Texas prisoner # 692618, seeks a certificate of appealability (COA) to appeal the district court's dismissal of her 28 U.S.C. § 2254 application for a writ of habeas corpus as time-barred by the one-year statute of limitations set forth in 28 U.S.C. § 2244(d).

To obtain a COA, a prisoner must make a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(2). If the district court's dismissal of a prisoner's habeas corpus application is based on a procedural ground, the prisoner must make a credible showing that the district court erred in dismissing it on that basis. See Sonnier v. Johnson,

161 F.3d 941, 943 (5th Cir. 1998). Only then will this court consider whether the prisoner has made a substantial showing of the denial of a constitutional right on the underlying claims. Id. at 943-44.

Charles has not made a credible showing that the district court erred in dismissing her § 2254 application as time-barred. Accordingly, her motion for a COA is DENIED.

HAROLD R. DeMOSS, JR.
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-41310

U.S. COURT OF APPEALS
FILED
JAN 11 2000
CHARLES R. FULBRUGE III
CLERK

IN RE: SHIRLEY ANN CHARLES,

Movant.

- - - - - - - - - - -

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

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Before POLITZ, HIGGINBOTHAM, and DeMOSS, Circuit Judges

BY THE COURT:

Shirley Ann Charles, Texas prisoner # 692618, moves this court for an order authorizing her to file a successive 28 U.S.C. § 2254 application in the district court. Charles contends that she is actually innocent of the charge that she used a deadly weapon (a firearm) in the commission of the crime of possession of a controlled substance based upon a new rule of law. Charles relies upon Bailey v. United States, 516 U.S. 137 (1995), in support of her claim. However, Charles's previous § 2254 petition was denied after Bailey was decided. As Charles fails to assert a new rule of constitutional law, made retroactive to

cases on collateral review by the Supreme Court that was previously unavailable, IT IS ORDERED that the motion for permission to file a successive § 2254 application is DENIED.

See 28 U.S.C. §§ 2244(b), 2254.