04-5946

No. _____

Supreme Court, U.S.
FILED
JUL 27 2004
OFFICE OF THE CLERK

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

_____ — PETITIONER
(Your Name)

vs.

_____ — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

_____
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

_____
(Your Name)

_____
(Address)

_____
(City, State, Zip Code)

_____
(Phone Number)

QUESTION(S) PRESENTED

QUESTION # 1

WOULD THE " DOCTRINE OF PROCEDURAL DEFAULT " BECOME FRUSTRATED BY THE FACT THAT INEFFECTIVE ASSISTANCE OF COUNSEL IS A MOOT ISSUE IN THAT IN 1984, THE CLAIM DID NOT EXIST AT THE HIGHER SCIENTISTIC CAUSE OF REVIEWS: MICROSCOPLY VERSUS DNA ANALYSIS. COUNSEL OF RECORD UNSUCCESSFULLY ARGUED THE ENLARGED SURFACE OF THE HEAD HAIR OF MR. GONZALEZ WAS TEXTURED INCONSISTENT WITH PETITIONER'S SUPPORTED BY THE STATE RESPONDENT'S CRIMINOLOGIST. IN U.S. JAKOBETZ, 506 U.S. 834 (1992), HAIR HAVE THE SAME DNA AS CONSISTENT WITH EACH INDIVIDUAL, THAT IS, THE SAME FORENSIC INFORMATION, USEFUL FOR FORENSIC ANALYSIS. THUS, THE HEAD HAIR FOUND IN THE DEAD " FIST " OF THE VICTIM TESTED FOR DNA WOULD CREATE FINALITY GOING TO MR. GONZALEZ STATING: TESTIMONY HE WAS NOT AT CRIME SCENE; TESTIFYING HE ONLY HEARD INCRIMINATING STATEMENTS FROM PETITIONER IN FUTURE EVENTS. THRUSTED IN STATE GROUND 7 (e) (9q-9r), AND, RESPONDENTS' NOT HEARING HABEAS WITH TWO MOTIONS' PRESENTED FOR JURISDICTION TO PROCEED.

A. Is question of Constitutional dimension so as to be in aid of the Court's Appellate Jurisdiction; Sixth Amendment,Fourth Amendment, fifth Amendment, and Fourteenth issue(s), SCR Rule 20.1;

B. Is question framed to warrant " Exceptional Circumstances " that would warrant the exercise of the Court's discretionary powers, SCR Rule 20.1;

C. Is Petitioner forthrightly waived from raising Ineffective Assistance of Counsel under the Sixth Amendment mandate, SCR Rule 20.4 (a) inclusive;

D. By all Respondents' not addressing above said Ground a violation of Petitioner's and other person(s) similarly situated under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution to Due Process by not providing Appealable Claim, SCR Rule 20.4 (a) inclusive;

E. Does Petitioner have an " Actual Innocence Claim " through the above question in accord to the Fourth, Fifth, and Fourteenth Amendments to Due Process;

F. Did the Federal Respondents' ' Apply to the Incorrect Law ' in ' Procedurally Barring ' the Petitioner's Habeas Petition with two Motions' under the AEDPA Standard consistent with the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution to Due Process;

G. Are there ' Extenuating Circumstances ' for the Court to assess the probative value of this question to obtain a remand of the Respondents in accordance with the Fifth and Four-

teenth Amendments to the United States Constitution to Due Process;

H. Is there an ' Actual Controversy ' in the Federal Circuit Appellate system of lost jurisdiction by Respondents' not specifically Citing to Ground 7 (e) (9q-9r), would be contrary to Respondents' Case Law that a Court must address each Ground denied for purposes of Appeal violate the Fifth and Fourteenth Amendments to the United States Constitution to Due Process;

I. Does a 'Fundamental Miscarriage' of Justice'occur under AEDPA (B) (i) the factual predicate for exercise of due diligence and, (ii) the facts underlying the Ground, if proven and reviewed in light of the evidence as convincing evidence that, but for Constitutional error, no reasonable fact finder would have found the Petitioner guilty of the underlying offense. If there is no jurisdictional access to Appeal violate the Fifth and Fourteenth Amendments to the United states Constitution to Due Process.

J. Does ' Cause and Prejudice ' apply in this Case and attach to "A" through "H" through the Fifth and Fourteenth Amendments to the United States Constitution to Due Process.

QUESTION(S) PRESENTED

QUESTION #2

WHETHER THE RESPONDENT ABUSED ITS DISCRETION IN VIOLATION OF THE PETITIONER'S RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION TO DUE PROCESS, BY DETERMINING FIRST PETITION APPEAL FROM THE CO-RESPONDENT WAS A SECOND OR SUCCESSIVE PETITION MAY BE INCONSISTENT WITH TO THE RECORD AND, SLACK V. McDANIEL, 529 U.S. 120 S.Ct.1595, 146 L.Ed. 2d. 542 (2000); UNDER AEDPA (B) (i) THE FACTUAL PREDICATE FOR CLAIM COULD NOT HAVE BEEN DISCOVERED PREVIOUSLY, THOUGH THE EXERCISE OF DUE DILIGENCE AND, (ii) THE FACTS UNDERLYING THE GROUND, IF PROVEN AND REVIEWED IN LIGHT OF THE EVIDENCE AS A WHOLE, WOULD BE SUFFICIENT TO ESTABLISH BY CLEAR AND CONVINCING EVIDENCE THAT, BUT FOR CONSTITUTIONAL ERROR, NO REASONABLE FACT FINDER WOULD HAVE FOUND THE PETITIONER GUILTY OF THE UNDERLYING OFFENSE.

A. Could create inconsistent application of procedural default within the Federal Circuit Court(s), contrary to Slack V. McDaniel, Supra;

B. Could deprive person(s) similarly situated by an actual innocence claim be inconsistent with Slack, Supra;

C. Could deprive person(s) similarly situated to not review for extenuatory circumstances, in order to hear new found evidence to support a Actual Innocence Claim, would be inconsistent with Slack, Supra.

JURISDICTION

The date on which the united States Court of Appeals decided my case was December 16, 2003

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: April 28, 2004, and a copy of the order denying rehearing appears at Appendix "Z"

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STATEMENT OF THE CASE

Petitioner was charged by was charged by way of information with muder with the use of a deadly weapon, robbery with the use of a deadly weapon, and kidnapping with the use of a deadly weapon on May 23, 1983, a jury convicted petitioner on July 19, 1984.

A direct appeal was taken to the nevada Supreme Court. on December 23, 1986, the Nevada Supreme Court entered its order dismissing appeal. See, Appendix "B" page 2, lines, 4-14.

Instead of filing a petition for post-conviction relief pursuant to Chapter 177 in the stte district court, petitioner proceeded directly to file a petition for writ of habeas corpus in the United States District court on October 25, 1988. See, Appendix "B" page 2, lines 15-28.

On August 20, 1990, the united States District Court for the District of Nevada entered its Order Dismissing the petition without prejudice to permit petitioner to exhaust his state remedies. See, Appendix "B" at page 2, lines 19-22.

Petitioner then filed Appendix "A" on October 2,1990. on March 13, 1992, the petitioner through counsel, Waldo De Castroverde replied to the answer to petition for writ of habeas corpus. APPENDIX "C" to State of Nevada's answer. See, Appendix "B". Petitioner's counsel filed a Motion For Late Pleading. Appendix "D" to Respondent's answer to petition for writ of habeas corpus.

Counsel of record was released due to a conflect of interest. See, Appendix "B".

On July 6, 1992, petitioner in pro se reply to answer to petition for writ of habeas corpus. See, Appendix "E".

On August 25, 1992, the petitioner's petition was Order

Dismissing Petition For Writ Of Habeas Corpus. See, Appendix "F"

On December 22, 1992, the State Supreme Court entered an Order Dismissing Appeal. See, Appendix "G"

On October 1, 1993, the Petitioner filed a petition of writ of habeas corpus pursuant to 28 U.S.C. subsection 2254. See, Appendix "H"

On May 26, 1994, the State of Nevada Answer To Petition For Writ Of Habeas Corpus pursuant to 28 U.S.C. SUBSECTION 2254 by a person in state custody. See, Appendix "I"

On march 7, 1995, the U.S. District Court entered an Order whereas, the petitioner will have (20) days to overcome the procedural default bar of grounds 5, 9 and 10. See, Appendix "J"

On October 19, 1995, the U.S. District Court entered an Order, a Memorandum Decision And Order; petitioner's petiltion for writ of habeas corpus (#1) is denied.. See, Appendix "K"

On October 19, 1995, the U.S. District Court entered a Judgment In A Civil Case. See, Appendix "L": See also, Appendix "N"

On September 26, 1995, the petitioner filed a Motion For Voluntary Withdrawal Notice Of Appeal. See, Appendix "M"

On November 16, 1995, the U.S. District Court entered an Order the Court declines to issue a certificate of probable cause. See, Appendix "O"

On November 21, 1995, the United States Court of Appeals for the Ninth Circuit entered an Order; See, Appendix "P":

> "This appeal is dismissed for lack of jurisdiction **See** 28 U.S.C. subsection 1291 (courts of appeals have jurisdiction of appeals from final decisions of the district court).
>
> Appellant's motion to dismiss this appeal voluntarily without prejudice is denied as moot. Id.

On December 18, 1995, the United States District Court entered an order on mandate. See, Appendix "Q"

On january 11, 1996, the UNited States Court of Appeals For The Ninth Circuit entered an Order, request for a certtificate of probable cause is denied.. See, Appendix "R"

On Febuary 26, 1996, The United States Court Of Appeals For The Ninth Circuit denying motion for reconsideration of the court's order of January 11, 1996.. See, Appendix "S"

The petitioner's copy of writ of habeas corpus and the two Motion(s) have become displaced. the petitioner has diligently requested a copy from the United State District Court and the United States Court of Appeals for the Ninth Circuit Court, to no avial

On August 22, 2003, the United States District Court for The District Of nevada, Dismissed without prejudice the petition for writ of habeas corpus. See, Appendix "T"

On August 22, 2003, the United States District Court for The District Of Nevada entered an Order petition and two Motions are denied. See, Appendix "U"

On September 2003, the petitioner filed his Notice of Appeal pursuant to Circuit Rule 24(C). See, Appendix "V"

On September 22, 2003, the United States District Court for The District Of Nevada entered an Order denying COA. See, Appendix "W"

On December 31, 2003, the united States Court Of Appeals For The Ninth Circuit sent to the petitioner a "Application For Leave To File Second Or successive Petiton Under 28 U.S.C. 2254 or 2255. See. Appendix "X"

On December 16, 2003, the United States Court Of Appeals For The Ninth Circuit entered an Order, the request for a certificate of appealability is denied. See U.S.C. SUBSECTION 2253(c)(2) (A)(B)(i)(ii). See, Appendix "Y"

On April 28, 2004, The United States Court Of Appeals For The Ninth Circuit entered an Order that the petition in the district court is denied; 28 U.S.C. subsection 2244(b)(2)(A)(B)(i)(ii). See, Appendix "Z"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPLICATION FOR LEAVE TO FILE SECOND OR SUCCESSIVE PETITION UNDER 28 U.S.C. § 2254 OR § 2255

12.31.03

Docket Number 03-16795 (to be provided by court)

Petitioner's name JULIO HERRERA

Prisoner registration number 19831

Address JULIO HERRERA
POB 607-19831
CARSON CITY, Nv 89702-607

Instructions - Read Carefully

1. This application, whether handwritten or typewritten, must be legible and signed by the petitioner under penalty of perjury. An original and five (5) copies must be provided to the Clerk. The application must comply with 9th Circuit Rule 22-3, which is attached to this form.

2. All questions must be answered concisely and in relationship to the questioned asked on this form.

3. The petitioner **shall** serve a copy of this application and any attachments on respondent and must complete and file a proof of service with this application.

4. The petitioner **shall** attach to this application copies of the magistrate judge's report and recommendation and the district court's opinion in any prior federal habeas proceeding under 28 U.S.C. § 2254 or § 2255 or state why such documents are unavailable to petitioner.

This form has not been officially adopted by the Ninth Circuit Court of Appeals, but prisoners are encouraged to use this form to comply with Ninth Circuit Rule 22-3 pending the completion of official rule-making procedures. Questions should be directed to the Office of Staff Attorneys, Motions/Pro Se Unit, (415) 556-9890

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You Must Answer the Following Questions:

(1) What conviction(s) are you challenging?

jury verdicts finding of guilt to kidnapping, robbery and murder

(2) In what court(s) were you convicted of these crime(s)?

Eighth Judicial District Court, Clark County, Nevada

(3) What was the date of each of your conviction(s) and what is the length of each sentence?

July 23, 1984; Count (I) life w/o parole; conse. life w/o Count (II) 15 years conse. 15 years; (III) life w/o conse. life w/o. all to run consecutive to each sentence.

For questions (4) through (9), provide information separately for each of your previous section 2254 or 2255 proceedings. Use additional pages if necessary.

(4) With respect to **each** conviction and sentence, have you ever filed a petition or motion for habeas corpus relief in federal court under 28 U.S.C. § 2254 or § 2255? Yes ☒ No ☐

(a) In which federal district court did you file a petition or motion?

District of Nevada

(b) What was the docket number? CV-N-88-552-HDM; CV-N-577-ECR; CV-N-03-0427-HDM: CV-N-93-733-HDM

(c) On what date did you file the petition/motion? 1988; 1993; 2003.

(5) What grounds were raised in your previous habeas proceeding? (list all grounds and issues previously raised in that petition/motion)

(I). Whether the district court lacked jurisdiction to determine the motion to vacate judgment on the merits. (II). Wheter the district court erred in denying the motion to vacate judgment without conducting an evidentiary hearing; (II). See. attachment, 2-(a) supplementation to I and II.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 28 2004

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

JULIO HERRERA,

Petitioner,

v.

JACKIE CRAWFORD,

Respondent.

No. 04-70129

ORDER

FILED
JUN 2 3 2004
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Before: O'SCANNLAIN, RYMER, and BEA, Circuit Judges.

The application for authorization to file a second or successive 28 U.S.C. § 2254 habeas corpus petition in the district court is denied. Petitioner has not made a prima facie showing under 28 U.S.C. § 2244(b)(2) that:

> (A) the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

No petition for rehearing or motion for reconsideration shall be filed or entertained in this case. *See* 28 U.S.C. § 2244(b)(3)(E).

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APPENDIX Z

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