NO. 03-10730

ORIGINAL

Supreme Court, U.S.
FILED
JUN 01 2004
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
TERM 2004

IN RE REYNALDO SAMBRANO VILLARREAL
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF HABEAS CORPUS AND FOR REVIEW TO THE GATEKEEPING ORDER TO THE FIFTH CIRCUIT PURSUANT TO THE ALL WRIT ACT 28 U.S.C.S. §1651

CASE NO. 04-40093

REYNALDO SAMBRANO VILLARREAL
Reg. No. 03368-078
United States Penitentiary
P. O. Box 2099
Pollock, Louisiana 71467

STATEMENT FOR NOT MAKING APPLICATION

IN DISTRICT WHERE PETITIONER IS HELD

The "saving clause" formulated by the Fifth Circuit does not provide any avenue or means through which petitioner can seek relief. The "saving clause" applies to claims that is (1) based on a retroactive applicable Supreme Court decision which establishes that petitioner may have been convicted of a non-existent offense (2) and that was foreclosed by Circuit law at the time the claim should have been raised in the petitioner's trial, appeal, or first § 2255 motion.

In contrast, petitioner does not rely on new law. Petitioner's claim relies on "newly discovered" evidence that shows he is actually innocent of the underlying offense.

Because petitioner's claim lies in the "narrow class of cases" that assert actual innocence accompanied by constitutional violation, and that are entitled to the less stringent standard found in **Schulp** "more likely than not". Petitioner's avenues are foreclosed by AEDPA and the formulated saving clause, thus making petitioner unable to apply in the district court in which he is held.

QUESTIONS PRESENTED

I. Do the added restrictions which AEDPA places on second and successive habeas petitions in conjunction with the Fifth Circuits formulated outline of the "savings clause" defining "inadequate or ineffective", suspends the Great Writ for the narrow class of cases that are entitled to the less stringent standard found in **Schlup**, thus making AEDPA unconstitutional to that extent ?

II. Did the Fifth Circuit wrongly observe that petitioner had not shown why this new evidence could not have been discovered previously, when there was clear evidence of misrepresentation by Officers of the Court and petitioner cannot be faulted for relying on that representation ?

III. Did the Fifth Circuit abuse its discretion in refusing to apply the law and inherent powers upon a clear showing of prosecutorial misconduct, perjurious testimony, and fraud upon the Court ?

Petitioner respectfully requests that this Honorable Court utilizes its reasonable good-will discretion by reviewing the present writ under the standards set forth by this Court in, **Haines v. Kerner,** 404 U.S. 519 (1972) (per curiam) (allegations of **pro se** complaints are held to less stringent standards than formal pleadings drafted by lawyers); "pro se petitions are generally read with deference to the petitioner's lack of formal legal training". **See Maleng v. Cook** 490 U.S. 488, 493 (1989).

STATEMENT OF THE CASE / FACTS

1. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L.104-132, 110 Stat.1214 (1996), was signed by the President on April 24, 1996. Title I of the Act, entitled "Habeas Corpus Reform", contains sections 101-108. AEDPA § 101-106 amend previously existing habeas statutes contained in Chapter 153 of the Judiciary Code, Title 28, United States Code. These amendments affect both capital and non-capital cases brought by the state and federal prisoners, by, inter alia, creating a statute of limitations and restrictions called "gate keeping".

Title I of the AEDPA is not a model of clarity. Since its enactment, the federal courts have struggled with the interpretation and application of its various provisions, and have definitively answered only a few of the many questions raised by the Act. This Court has described Title I of the AEDPA thus:
"[I]n a world of silk purses and pigs' ear, the Act is not a silk

purse of the art of the statutory drafting." **See Lindh v Murphy,** 117 S. Ct. 2059 (1997).

The relevant provisions in Title I of the Act that made federal habeas corpus changes included § 105 (b) (amending 28 U.S.C.S. § 2244 (b), which addresses second or successive applications by federal prisoners under 28 U.S.C.S. § 2255. Section 105 of the Act (to be codified as a 28 U.S.C.S. 2244 (b)(2)(A) and (b)(2)(B) specifies the requirements that must be demonstrated before a second or successive application is authorized, creating a "gate keeping" mechanism. The plain reading of the language forecloses **all** claims of sentencing errors, which would also include a claim of "actually innocent" of a capital sentence. Also, a prisoner who asserts an actual innocence claim accompanied by a non-error free trial and that this Court has held, is entitled to a less stringent standard, "more likely than not", would be unfairly prejudiced when the only avenue for relief requires the extra ordinary high standard "clear and convincing", thus making the Act unconstitutional to the extent of this "narrow class of cases"

2. Petitioner filed an application for authorization to file a second and successive motion asserting "newly discovered" evidence, that could not have been discovered previously through the exercise of due diligence, and that when viewed in light of the evidence as a whole, sufficiently established by clear and convincing evidence that , but for constitutional error, no reasonable factfinder would have found petitioner guilty of the underlying offense. In retrospect, petitioner asked the Fifth Circuit to use the less stringent standard outlined in **Schlup**. See **Schlup v Delo,** 513 U.S.

298, 327 (1985). At the same time the court was faced with a troublesome proposition in which this Court now is. That is, although petitioner did commit an unlawful act, he is actually innocent of the underlying offense of conviction. Whether petitioner should have been tried for manslaughter or involuntary manslaughter is for another judicial tribunal to decide.

In contrast, the Fifth Circuit presumed to use the more stringent standard "clear and convincing", articulated by the new AEDPA restrictions. Even though petitioner is entitled to the less stringent standard. It is clear and indisputable by the "newly discovered "evidence that no reasonable factfinder would have found petitioner guilty of the underlying offense. The Fifth Circuit observed this clear standard yet refused to exercise its authority and duty in applying the law. Specifically because of the troublesome proposition it faced. Undeniably the **record** reflects that the prosecutor stooped by submitting fabricated evidence and perjured testimony in his quest to bring petitioner's conduct within federal reach. Clearly this is not tenable in a system constitutionally bound to accord defendants due process.

In any event, it seems that the Fifth Circuit's view and order that petitioner show why his "newly discovered" evidence could not have been discovered previously undermines this Court's controlling precedent on the issue of "cause" which also accords "due diligence". That is petitioner should not be faulted because of prosecutor misrepresentation. **See Strickler v Greene**, 527 U.S. 263 (1999): **Banks v. Dretke**, 540 U.S.____ (2004). In the instant case, the prosecution tendered into evidence as exhibit No. 6 a peace

officer certificate. See (App. TR. pg. 537). Deputy Don Welch also testified that Darrell Lunsford had a peace officer certificate and schooling required. (See App. TR. pg. 537, 560-561). Under this false representation, it was appropriate for petitioner to assume that his prosecutor would not stoop to improper litigation conduct to advance prospects for gaining a conviction. **See Berger v. United States,** 295 U.S. 78, 88 (1935); **Strickler,** 527 U.S. at284. It is not incumbent on petitioner to prove these representations false; rather, petitioner was entitled to treat the prosecutor's submission as truthful. **See Banks** 540 U.S._____.

Ordinarily, it is presumed that public officials have properly discharged their official duties. **Bracy v. Gramley,** 520 U.S. 899, 909, (1997) (quoting **United States v. Chemical Foundation, Inc,** 272 U.S. 1, 14-15 (1926). This Court has several times underscored the "special role played by the American prosecutor in the search for truth in criminal trials". **Strickler,** 527 U.S. at 281; accord **Kyles v. Whitley,** 514 U.S. 419, 439- 40; **United States v. Bagley** 473 U.S. 667, 675 n. 6 (1985); **Berger,** 295 U.S. at 88. **See also Olmstead v. United States,** 277 U.S. 438, 484 (1928) (Brandeis, J., dissenting). Courts, litigants, and juries properly anticipate that "obligations [to refrain from improper methods to secure a conviction]... plainly rest[ing] upon the prosecuting attorney, will be faithfully observed". **Berger,** 295 U.S. at 88. Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation. **See Kyles,** 514 U.S. at 440. In light of those misrepresentations, petitioner did not lack appropriate diligence as the Fifth Circuit's Order holds.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U. S. COURT OF APPEALS
FILED
MAR 0 2 2004
CHARLES R. FULBRUGE III
CLERK

No. 04-40093

IN RE: REYNALDO SAMBRANO VILLARREAL,

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. § 2255 motion

Before REAVLEY, STEWART, and CLEMENT, Circuit Judges.

BY THE COURT:

Reynaldo Sambrano Villarreal, federal prisoner # 03368-078, requests leave to file a successive motion pursuant to 28 U.S.C. § 2255, which requires that he make a prima facie showing that his claims are based on either: (1) a new rule of constitutional law made retroactive on collateral review by the Supreme Court; or (2) newly discovered evidence, which when viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact finder would have found him guilty. See 28 U.S.C. §§ 2244(b)(3)(A) and 2255.

Villarreal seeks to assert in a successive motion that he has obtained newly-discovered evidence reflecting that a jurisdictional element of his 1991 murder conviction was lacking because the victim, an elected Texas Constable, was not a law enforcement officer. He asserts that testimony and evidence to the contrary were perjured and manufactured, and that evidence showing that the victim was not on official business at the time of the murder was withheld in violation of Brady[1]. He contends that alleged fraud upon the court justifies relief pursuant to 28 U.S.C. § 2255.

Villarreal has not shown that the factual predicate for his claims could not have been discovered previously, or that such evidence would be sufficient to establish by clear and convincing evidence that no reasonable fact finder would have found him guilty. See 28 U.S.C. §§ 2244(b)(2)(B) and (b)(3)(A).

Authorization is DENIED.

[1] Brady v. Maryland, 373 U.S. 83 (1963).