ORIGINAL

No. 02 10815

Supreme Court, U.S.
FILED
APR 17 2003
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

In re JOHN DAVID MOORE - PETITIONER

VS.

STATE OF TEXAS - RESPONDENT

ON PETITION FOR AN EXTRAORDINARY WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF APPEALS - FIFTH CIRCUIT

PETITION FOR AN EXTRAORDINARY WRIT OF HABEAS CORPUS

John David Moore #630975
P.O. Box 4500
Tennessee Colony, TX 75886

Questions Presented

(1) Whether the Fifth Circuit has abridged the Fourteenth Amendment when narrowing the scope of the actual innocence exception to excuse procedural default, thereby violating the rights of due process and equal protection for some actually innocent petitioners?

(2) Whether the lower courts have denied Petitioner his Fourteenth Amendment and legal rights by an abusive exercise of discretion: (i) to ignore or refuse to acknowledge Petitioner's substantial claim of actual innocence to excuse his procedural default; (ii) to ignore or refuse to acknowledge Petitioner's substantial claims of constitutionally ineffective assistance of trial and/or appellate counsel to deny him his asserted entitlement to the cause and prejudice doctrine to excuse his procedural default and; (iii) to ignore or refuse to acknowledge Petitioner's substantial claim of fraud on the court, all of which Petitioner asserted would allow the merits of his issues to be reached?

List Of Parties

All parties do not appear in the caption of the case of 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:

1. John David Moore, the petitioner;

2. Kirk Rice, trial counsel for the petitioner;

3. Keith Orsburn, appellate counsel for the petitioner;

4. Tom Whitlock, appellate counsel for the petitioner;

5. Janie Cockrell, Director for TDCJ-ID;

6. The State of Texas, by and through the Office of the Attorney General of Texas; Bruce Isaacks, Denton County Texas District Attorney, Paige Miller, Lisa Decker, and Kathleen Walsh, Assistant DA's for Denton County Texas.

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he was entitled to an evidentiary hearing and discovery, as motioned for, to develop any issue that may raise the least doubt concerning his entitlement to his asserted exceptions to allow the merits of his issues to be reached.

Petitioner's record on appeal does confirm that he has twice been denied his lawful entitlement to review by the lower Federal courts to have the merits of his issues reached.

Petitioner has no reason to believe that a return to State court or a return to the lower Federal courts would now gain him the relief that he is legally entitled to in light of past actions by the State courts and the ignoring of Moore's most recent request made to the State (see Appendix K) and the actions by the lower courts in denying Moore his legal rights.

As a pro se petitioner, without legal training, Moore knows of no other form of action that he may now pursue or any other court to petition to correct this fundamentally miscarriage of justice that is being imposed upon him.

REASONS FOR NOT MAKING APPLICATION TO THE USDC

Petitioner has continuously presented fact and evidence to the USDC and the Fifth Circuit that his procedural default, pursuant to § 2244(d)(1)(A) was excusable under his substantial showing of actual innocence of the charged crime and/or his indisputable entitlement to excuse his procedural default under the doctrine of cause and prejudice so that the merits of his constitutional issues could be reached.

Moore has twice presented to the USDC, followed by two

reach the merits of his issues.

Based upon the past history of the lower courts and their case law in dealing with Moore's claims of entitlement to have the merits of his issues reached, Petitioner believes that a return to the USDC would be fruitless and just prolong this fundamental miscarriage of justice being suffered by him in violation of the Eighth Amendment.

STATEMENT OF FACT RELEVANT TO THE ISSUES

Petitioner's argument is straightforth. The lower courts have denied him his Fourteenth Amendment and legal rights to excuse his procedural default and have the merits of his issues reached. This denial of Petitioner's Fourteenth Amendment and legal rights will be demonstrated within this petition that this denial was accomplished through the abridgment of the actual innocence exception, the abusive exercise of discretion to ignore or refuse to recognize and address Petitioner's indisputable entitlement to the doctrine of cause and prejudice and ignoring his substantial claim of fraud on the court, which did call into question, the very legitimacy of Petitioner's conviction and incarceration.

On September 22, 2000, Petitioner presented for review his § 2254 petition and brief in support. This petition was procedurally defaulted pursuant to § 2244(d)(1)(A).

In his § 2254 petition, Moore presented the following issues, and argued his constitutional violations within these issues. The issues presented were: Prosecutorial Misconduct;

Ineffective Assistance Of Trial Counsel and; Ineffective Assistance Of Appellate. [1]

Petitioner asserted that although his petition was untimely and in violation of § 2244(d)(1)(A), nonetheless, his procedural default should be excused under the actual innocence exception and/or under the cause and prejudice doctrine.

In Petitioner's issue of Prosecutorial Misconduct, it was alleged that the prosecutor had concealed and suppressed exculpatory material evidence in violation of Brady v Maryland, 83 S.Ct. 1194 (1963). Petitioner further argued that the prosecutor used known perjured testimony of its medical expert, Dr. Gerald Balsley, OB-GYN, in violation of Napue v Illinois, 79 S.Ct. 1173 (1959) to aid the prosecution in suppressing and concealing this Brady material. See Napue at 1176; Jury's estimate of the truthfulness and reliability of a given witness may be determinative of quilt or innocence ... that a defendant's ... liberty may depend.

In his § 2254 petition and brief, Petitioner presented "clear and convincing" evidence of the following facts to support his argument for discovery of this exculpatory material evidence and to demonstrate that he was actually innocent of the charged crime, and that this showing of actual innocence should excuse his procedural default and allow the merits of his issues to be

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[1] Although Moore presented six issues for review, only those issues that are relevant to determine the merits of this petition are listed.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-40062
USDC No. 4:00-CV-361

U.S. COURT OF APPEALS
FILED
OCT 28 2002
CHARLES R. FULBRUGE III
CLERK

JOHN DAVID MOORE,

Petitioner-Appellant,

versus

JANIE COCKRELL, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent-Appellee.

Appeals from the United States District Court
for the Eastern District of Texas

O R D E R:

John David Moore, Texas prisoner #630975, has moved this court for a certificate of appealability ("COA") in order to appeal the district court's dismissal of his FED. R. CIV. P. 60(b) motion and his postjudgment motions requesting an evidentiary hearing, production of records, clarification of the order of dismissal, and reconsideration of the order of dismissal. He has also moved this court for leave to proceed in forma pauperis ("IFP") on appeal and for incorporation of his records from his prior appeal. In order to obtain a COA, he must make a

11/1/00

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
DAVID J. MALAND, CLERK
BY DEPUTY

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

SHERMAN DIVISION

JOHN DAVID MOORE, #630975	§	
VS.	§	CIVIL ACTION NO. 4:00cv361
DIRECTOR, TDCJ-ID	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Petitioner John David Moore, an inmate confined in the Texas prison system, brings this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition was referred for findings of fact, conclusions of law and recommendations for the disposition of the case.

The Petitioner is in custody pursuant to a sexual assault conviction out of the 16th Judicial District Court of Denton County, Texas. On June 26, 1992, he was sentenced to twenty years imprisonment. He states that the Second Court of Appeals affirmed his conviction on October 28, 1994. The Texas Court of Criminal Appeals refused his petition for discretionary review on March 8, 1995. The Petitioner states that he did not file a petition for a writ of certiorari, and the conviction became final. The Petitioner states in his brief that he filed his first state application for a writ of habeas corpus on July 21, 1997. The Texas Court of Criminal Appeals denied the application on April 1, 1998. The Petitioner filed a second application for a writ of habeas corpus on January 7, 2000. The Texas Court of Criminal Appeals denied the application on February 16, 2000. The present petition challenging the conviction was filed on October 6, 2000. The petition is dated September 22, 2000 and will be deemed filed on that date pursuant to the "mailbox rule." *See Spotville v. Cain*, 149 F.3d 374, 377 (5th Cir. 1998).

APPENDIX H

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