

No. 10-8317

In The
SUPREME COURT OF THE UNITED STATES

CLEVE FOSTER,
Petitioner,

v.

STATE OF TEXAS,
Respondent

Petition for Rehearing of Order Denying Petition for Writ of Certiorari

THIS IS A DEATH PENALTY CASE

**Mr. Foster is Currently Scheduled to be Executed
Tuesday, April 5, 2011, sometime after 6:00 p.m.**

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***Member, Bar of the Supreme Court and
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PETITION FOR REHEARING OF ORDER DENYING
PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court rule 44.2, Mr. Foster hereby respectfully requests that this Court rehear its Order denying his Petition for a Writ of Certiorari. This extraordinary request is made in light of this Court's recent grant of certiorari in *Maples v. Maples*, 2011 WL 940889 (U.S.). The Certification of Counsel required by Rule 44.2 is appended to this document. A Motion for Leave to File Petition for Rehearing Out of Time is being filed concurrently with this Petition.

PROCEDURAL HISTORY

Cleve Foster was convicted and sentenced to death for the murder of Nyannuer "Mary" Pal in the Criminal District Court No. 1 of Tarrant County, Texas on February 12, 2004. The conviction and sentence were affirmed on direct appeal. *Foster v. State*, No. 74,901 (Tex. Crim. App. Apr. 12, 2006). This Court denied *certiorari* review on January 08, 2007. *Foster v. Texas*, 549 U.S. 1118 (2007).

Counsel - not the undersigned - was appointed to represent Mr. Foster for purposes of his state habeas proceedings. The Court of Criminal Appeals denied Mr. Foster's Application for Writ of Habeas Corpus. *Ex Parte Foster*, No. 65,99-01 (Tex. Crim. App. Mar. 21, 2007). In doing so, it adopted wholesale the Findings of Fact and Conclusions of Law submitted by the state which had previously been adopted by the trial court.

Mr. Foster, represented by undersigned counsel, challenged his conviction in federal court pursuant to 28 U.S.C. § 2254. In doing so, the number and scope of issues raised were dictated by the extraordinarily limited nature of the state habeas petition and

presentation. The United States District Court denied his petition, *Foster v. Quarterman*, 2008 WL 5083078 (N.D. Tex.), and the United States Court of Appeals for the Fifth Circuit denied his Application for a Certificate of Appealability. *Foster v. Thaler*, 369 Fed. Appx. 598, 2010 WL 924885 (5th Cir. March 15, 2010). Mr. Foster's Petition for Writ of Certiorari was denied. *Foster v. Texas*, __ U.S. __, 2010 WL 3698830 (Dec. 13, 2010).

After the denial by the Fifth Circuit, Mr. Foster was scheduled for execution on January 11, 2011.

It was not until December 17, 2010 that Mr. Foster was able to obtain the *pro bono* services of a blood spatter expert. The expert's affidavit was presented in conjunction with a subsequent Application for Writ of Habeas Corpus to the Texas Court of Criminal Appeals, which asserted a claim of innocence and ineffective assistance of counsel, and outlined the deficiencies of appointed state habeas counsel that prevented these claims from being presented earlier. The Court of Criminal Appeals dismissed that subsequent Application on December 30, 2010 in *Ex Parte Cleve Foster*, No. WR 65,799-02 (Tex. Crim. App. Dec. 30, 2010). Judge Cochran filed a statement concurring in the dismissal. *Id.* Judge Price, joined by Judge Holcomb, dissented, stating "[i]t is simply intolerable to refuse to entertain a claim from an arguably innocent applicant, raised in a subsequent writ application, simply because he was unlucky enough to draw initial writ counsel of questionable competence." *Id.*, slip op. at 3 (Price, J., dissenting). Judge Price also noted that "I am inclined to agree with applicant, at least on the basis of his pleading, that his

trial counsel provided ineffective assistance of counsel in this [failure to obtaining the assistance of a blood spatter expert] regard.” *Id.*, slip op. at 1, fn. 1.

On January 10, Mr. Foster filed with this Court a Petition for a Writ of *Certiorari* to the Texas Court of Criminal Appeals, setting forth the following Question Presented:

Texas has recognized that condemned prisoners must have the assistance of counsel to be able to challenge their convictions and death sentences in state habeas corpus proceedings by providing a statutory right to counsel in such proceedings. The Texas Court of Criminal Appeals, however, has determined that the statutory right to habeas counsel does not require that counsel provide effective assistance. In fact, appointed state habeas counsel often performs abominably, as did counsel appointed to represent Mr. Foster, when he failed to perform the investigation necessary to adequately assert his powerful claim of innocence, or raise the trial ineffectiveness claims pivotal to same. As a direct result, subsequent efforts, in any court, to investigate and present these facts and claims were thwarted.

In Mr. Foster’s case, newly appointed federal habeas counsel identified and attempted to investigate and raise a claim that trial counsel were ineffective in failing to present to the jury a confession written by Mr. Foster’s co-defendant, and in failing to secure a blood spatter expert to draw into question a pivotal fact in the prosecution’s extraordinarily weak case. The state opposed discovery and funding for investigation and experts because these particular claims had not been raised in the initial state habeas proceedings, and argued that any subsequent attempt to raise them in state habeas proceedings would be procedurally barred. The federal courts accepted the state’s argument, supplied only the most minimal investigative funding, found the claims unexhausted and defaulted, and denied relief. Thereafter, when Mr. Foster’s federal habeas counsel were able to secure the *pro bono* assistance of a blood spatter expert and present the more-fully-developed claim to the state courts, the Court of Criminal Appeals dismissed the claim related to the ineffective assistance of trial counsel for failing to secure and present blood spatter testimony because it had not but could have been raised in the first state habeas proceeding. The claims and facts in support, while pointing strongly to Mr. Foster’s innocence, failed to meet the CCA’s heightened burden imposed at the successive state habeas stage.

In sum, Texas’ provision of habeas counsel without requiring competent performance has precluded condemned prisoners like Mr. Foster, who have the misfortune of being assigned counsel who perform ineffectively, from even the most minimal review of viable constitutional claim. The question that arises out of these circumstances is:

Whether the rights to equal protection, due process, and access to the courts demand that condemned prisoners be afforded the effective assistance of counsel in pursuing state habeas remedies with respect to claims, such as innocence and ineffective

assistance of trial counsel, that can only be raised in state habeas proceedings and if not raised there are thereafter barred?

On January 11, 2011, at approximately 6 pm, this Court granted Mr. Foster's Motion for a Stay of Execution pending disposition of his petition for a writ of certiorari. *See Foster v. Texas*, 131 S.Ct 991 (2011) (Scalia, J. and Alito, J., dissenting). On January 18, this Court denied *certiorari* and lifted the stay. *Foster v. Texas*, 131 S.Ct. 1034 (2011).

On January 28, 2011, the trial court scheduled Mr. Foster for execution on April 5, 2011.

ARGUMENT

On March 21, 2011, this Court granted *certiorari* in *Maples v. Maples*, 2011 WL 940889 (U.S.) on the following question:

Whether the Eleventh Circuit properly held that there was no "cause" to excuse any procedural default where petitioner was blameless for the default, the State's own conduct contributed to the default, and petitioner's attorneys of record were no longer functioning as his agents at the time of any default.

Petitioner submits that the resolution of the question presented in *Maples* will have direct bearing on the issues presented in his January, 2011 petition for a writ of *certiorari*.

Mr. Foster was Blameless for any Procedural Default

As Mr. Foster discussed in his petition for writ of certiorari, *See* p. 26; Appendix 2, Mr. Foster was adamant that he did not want appointed state habeas counsel to represent him in federal court. He detailed state habeas counsel's

deficiencies in a letter to the federal district court asking that different counsel be appointed:

Dear Karen Mitchell,

I do NOT yet know which Federal Judge has been assigned to my Federal Appeal "Capital Case" so I pray that addressing this accordingly will be allowed.

I would ask that State Habeas Attorney Robert Ford in no way be connected to my Federal Appeals. he neglected to properly keep me informed, I asked him repeatedly to investigate issues and he did not, he refused to answer my questions and after having asked him numerous times to allow me the chance to view my WRIT before submitting it, it was filed without my knowledge. At this time I pray that my request be granted.

Thank you

Id.

To his appointed state habeas attorney Mr. Foster wrote:

RE: WRIT

Dear Mr. Ford,

due to your lack of attention to detail and poor communication with me and your willingness or the lack thereof to properly investigate my allegations, I'm letting you know as of this date mentioned above. I do NOT want you to have anything to do with my Federal Appeals.

Mr. Ford, I feel had you raised some attention to the allegations I mentioned to you like you requested I do in your September 9, 2004 letter to me, it is to my belief my case would have been over turned at the state level.

This is my life Mr. Ford and I feel you treated me like a dog so please, I ask that you NOT try and be assigned to my Appeals at a Federal level.

Mr. Foster, an indigent death row prisoner, did everything within his power to request, convince and compel his appointed state counsel to raise, in every way possible, all claims related to his innocence. That counsel did so in a manner that was so ineffective it was the equivalent of having no counsel at all cannot be blamed on Mr. Foster.

The State's Own Conduct Contributed to the Default

State habeas counsel was vetted, chosen, and appointed by the state. While stories and documentation of the profound inadequacies of appointed state habeas counsel were widely available,¹¹ neither the state of Texas nor the courts tasked with screening and appointing counsel to death sentenced inmates for purposes of their state habeas proceedings acted to rectify the problems identified. The state's conduct in failing to take any steps to ensure that state habeas counsel appointed to represent Mr. Foster was competent contributed – indeed caused – the default.

At the Time of Default, Mr. Foster's Attorney was Represented by Counsel so Deficient he was Not Functioning as Mr. Foster's Agent.

As outlined in Mr. Foster's petition for a writ of certiorari, at the point of default of his claims (in state habeas proceedings, when his claims had to have been presented to

¹¹ See TEXAS DEFENDER SERVICE: *Texas Justice and the Death Penalty* (2000), available at <http://www.texasdefender.org/publications.asp> (last visited April 1, 2011); TEXAS DEFENDER SERVICE, *Lethal Indifference: The Fatal Combination of Incompetent Attorneys and Unaccountable Courts* (2002), available at <http://www.texasdefender.org/chapters.pdf> (last visited April 1, 2011); Andrea Keilen & Maurie Levin, *Moving Forward: a Map for Meaningful Habeas Reform in Texas Capital Cases*, 34 Am. J. Crim. L. 207 (2007).

the state court in order to warrant consideration by the federal courts, *see* 28 U.S.C. s. 2254(b)(1)(A)), he was “represented” by counsel who was patently deficient. As outlined in Mr. Foster’s petition for writ of certiorari, the majority of the claims raised in state habeas were either not cognizable, or were boilerplate. While an innocence claim was technically raised, it did not reflect an ounce of extra record investigation, misstated the applicable state law, and merely adopted the “sufficiency of the evidence” arguments raised on direct appeal (and thus was also not cognizable in habeas, *see Gardner v. State*, 959 S.W.2d 189 (Tex. Crim. App. 1996). *See* Petition for Writ of Certiorari at pp. 24-26. Moreover, state habeas counsel was ignoring Mr. Foster’s requests, directions, and pleas. *See supra*. For all intents and purposes, Mr. Foster’s state habeas counsel was not acting as Mr. Foster’s agent.

The questions of cause, default, agency, and blame integral to the issue presented in Maples are all integral to and raised by Mr. Foster’s Petition for a Writ of Certiorari. Thus, the disposition of Mr. Maples’ case will bear directly on the fair resolution of Mr. Foster’s case.

CONCLUSION

Mr. Foster respectfully requests that this Court reconsider its previous denial of his petition for a writ of *certiorari*, and asks that this Court hold this case for disposition in light of *Maples*.

Respectfully Submitted,

/s/ F. Clinton Broden
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**CERTIFICATION OF COUNSEL
SUBMITTED PURSUANT TO SUPREME COURT RULE 44.2**

Pursuant to Supreme Court Rule 44, undersigned counsel for Mr. Foster hereby certifies that his Motion for Rehearing, filed this 1st day of April, 2011, is submitted in good faith, and not for purposes of delay. Undersigned counsel further submits that the grounds for this Petition are intervening circumstances of a substantial or controlling effect, namely this Court's grant of certiorari in *Maples v. Maples* on March 21, 2011.

The signature below attests to this certification.

/s/ F. Clinton Broden
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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court; that I am counsel for Cleve Foster; that on April 1, 2011, I caused the foregoing **Petition for Rehearing of the Denial of Petition for a Writ of *Certiorari* to the Texas Court of Criminal Appeals, including Certification of Counsel**, to be served by electronic delivery on counsel for the State, Laura Grant Turbin, Assistant Attorney General, Capital Litigation Division, P. O. Box 12548, Austin, Texas 75211 by delivery to Laura.turbin@oag.state.tx.us, and that all parties required to be served have been served.

/s/ F. Clinton Broden
F. Clinton Broden