No. WR-83,014-01

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

EX PARTE KENNETH BROUSSARD,
APPLICANT

On Application for a Writ of Habeas Corpus
Cause No. 1451074-A in the 178th District Court
Harris County

MOTION REQUESTING THE COURT OF CRIMINAL APPEALS RECONSIDER ITS DECISION IN *EX PARTE BROUSSARD* UPON ITS OWN INITIATIVE (TEX. R. APP. P. R. 79.2(D))

ARGUMENT

1. The Court's opinion does not address Broussard's second ground, and this case should be reconsidered to address this ground

This Court's opinion addresses only Broussard's first ground – relating to whether or not Broussard's plea was involuntary. However, the trial court additionally recommended relief upon a second ground - "In light of the lab report which indicates that Applicant was not guilty of the specific offense justifying the conviction in this case, Applicant's conviction [ ] for manufacture or delivery of substance in p.g. 1, < 1 g. (cocaine) violates due process of law." (Writ C.R. at 40-41). This Court's opinion does not mention or otherwise address this second ground for relief.

Article 11.07 gives this Court plenary authority to consider any ground for relief that "the law and facts may justify." TEX. CODE CRIM. PROC., art. 11.07 § 5. The

Texas Rules of Appellate Procedure provide this Court similar authority to review applications for writs of habeas corpus: "The Court may deny relief based upon its own review of the application or may issue such other instructions or orders as may be appropriate." TEX. R. APP. P. 73.6. While the law does not explicitly require this Court to address every ground raised in a writ application, the law favors relief: "Every provision relating to the writ of habeas corpus shall be most favorably construed in order to give effect to the remedy, and protect the rights of the person seeking relief under it." TEX. CODE CRIM. PROC., art. 11.04.

2. Where there is no evidence to support a conviction, the defendant has the right to post-conviction relief

Unlike a claim of insufficient evidence, a no-evidence claim is cognizable on a writ of habeas corpus:

> It is well settled that a challenge to the sufficiency of the evidence is not cognizable on an application for a post-conviction writ of habeas corpus. However, a claim of no evidence is cognizable because "[w]here there has been no evidence upon which to base a conviction, a violation of due process has occurred and the conviction may be attacked collaterally in a habeas corpus proceeding." If the record is devoid of evidentiary support for a conviction, an evidentiary challenge is cognizable on a writ of habeas corpus.

Ex parte Perales, 215 S.W.3d 418, 419–420 (Tex. Crim. App. 2007).

It is not a mere distinction without a difference that the substance in this case turned out to be methamphetamine and not cocaine. This Court grappled with questions regarding whether possession of two distinct controlled substances in the same penalty group constitute a single offense or whether it constitutes two separate

offenses. *Watson v. State*, 900 S.W.2d 60 (Tex. Crim. App. 1995). The Court first noted that each unique controlled substance offense has a different element of proof:

> The charge of possession of heroin requires proof of possession of heroin. The State offered evidence of a chemical analysis that some of the capsules tested positive for heroin. Likewise, the charge of possession of cocaine requires proof of possession of cocaine, and the State offered evidence of a chemical analysis that some of the capsules tested positive for cocaine. Different proof is required for possession of cocaine than for possession of heroin, and that proof is provided in this case.

Id. at 61. This Court then addressed whether possession of two unique controlled substances constituted separate offenses: "the Legislature intended to make possession of *each* individual substance within the same penalty group a separate and distinct offense." *Id.* at 62 (emphasis original).

Broussard's case is distinguishable from the *Ex parte Palmberg* because it does not involve the quality of evidence, but rather it involves the refutation of evidence. As noted by this Court's opinion, Palmberg's writ claims originated from the disclosure that the drug laboratory could not evaluate the questioned evidence in Palmberg's case, therefore could not "prove the substance he possessed was cocaine." *Ex Parte Palmberg*, 491 S.W.3d 804, 805 (Tex. Crim. App. 2016), *reh'g denied* (June 15, 2016). To the contrary, Broussard is able to conclusively demonstrate that the evidence in this case did not contain cocaine. (Writ C.R. at 22, 36). While there may have been evidence to support Broussard's conviction for delivery of methamphetamine, it is not the same sort of evidence needed to support a conviction

for delivery of cocaine. *Watson*, 900 S.W.2d at 61-62. In this case, "[w]here there has been no evidence upon which to base" Broussard's conviction for delivery of cocaine, "a violation of due process has occurred." *Ex parte Coleman*, 599 S.W.2d 305, 307 (Tex. Crim. App. 1978)

PRAYER

Broussard prays that this Court reconsider its decision upon its own motion in order to address the trial court's second recommendation for relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this "Motion Requesting the Court of Criminal Appeals Reconsider Its Decision in *Ex parte Broussard* upon its Own Initiative (Tex. R. App. P. R. 79.2(d))" has been served upon the Harris County District Attorney's Office – Conviction Integrity, on April 13, 2017 by electronic service.

/s/ Nicolas Hughes
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