



**IN THE COURT OF CRIMINAL APPEALS
OF TEXAS**

NO. WR-62,023-02

JOSE LUIS VILLEGAS, Appellant

v.

THE STATE OF TEXAS

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS
AND MOTION TO STAY THE EXECUTION
FROM CAUSE NO. 01-CR-0196-G
IN THE 319TH JUDICIAL DISTRICT COURT
NUECES COUNTY**

KELLER, P.J., filed a concurring opinion, in which KEASLER, HERVEY AND COCHRAN, JJ., joined.

In 2002, Villegas killed three people. His primary defense, which the jury rejected, was that he had a mental illness called “intermittent explosive disorder” – in other words, uncontrollable rage. Now, for the first time, eight days before his scheduled execution, he alleges in a subsequent habeas application that he is mentally retarded. I agree that we should dismiss this transparent last-ditch

attempt to delay Villegas’s execution because he has failed to meet an exception to the bar against considering a subsequent application.

Neither at trial nor in proceedings related to his initial habeas application has there ever been any suggestion that Villegas is mentally retarded. *Atkins v. Virginia*¹ had already been decided when the initial application was filed, so he cannot meet the “new facts” exception found in §5(a)(1).² He contends instead that he meets the “innocence of the death penalty” exception of §5(a)(3) under this Court’s jurisprudence in *Ex parte Blue*.³

The Legislature has determined that the State’s interest in finality justifies the imposition of a higher burden upon a subsequent applicant who, like Villegas, did not avail himself of the opportunity to raise a claim of mental retardation in an initial writ.⁴ An applicant who raises a claim under *Blue* must make “a threshold showing of evidence that would be at least sufficient to support an ultimate conclusion, by clear and convincing evidence, that *no rational factfinder* would fail to find mental retardation.”⁵

Villegas has not made such a showing. In concluding in *Blue* that the applicant had failed to meet this rigorous standard, we considered not only Blue’s pleadings, but evidence that was

¹ 536 U.S. 304 (2002).

² See TEX. CODE CRIM. PROC. art. 11.071 §5(a)(1).

³ 230 S.W.3d 151 (Tex. Crim. App. 2007).

⁴ *Id.* at 162.

⁵ *Id.* at 163 (emphasis added).

introduced at trial, specifically, an IQ test that showed a full scale IQ of between 75 and 80.⁶ In the case before us, Villegas has presented a significant amount of evidence in support of his mental retardation claim, including affidavits from family members. Some of the same family members testified at trial and, consistent with *Blue*, their testimony may be considered at least to the extent that it rebuts affidavits submitted with the current application.⁷

None of Villegas's witnesses at trial even hinted that he was mentally retarded. On the one hand, his mother-in-law, Arecelia Casarez, testified on direct examination, that "Joey is very smart," and that he obtained his GED "with a very high qualification." Her grandson reminded her of Villegas (his father) because the grandson "is an A/B honor role student. He's a very smart, intelligent, little boy." On cross-examination, she agreed that Villegas "took his GED and passed it like the first time." Her affidavit, on the other hand, clearly tries to establish that Villegas is mentally retarded. In the affidavit, she says "his speech was always slow" and "he had to think about what he was saying, and he sometimes did not make sense." He "had food on his face and clothes all the time" and he relied on his wife to help him get dressed for work and get to work. This last allegation is contrary to Ms. Casarez's trial testimony about Villegas's job performance. At trial, when questioned as to whether he "had a lot of other good jobs where he [had] been pretty stable and working at a job for...five years, ten years" she answered "Yes."

Villegas's own exhibits, attached to his current application, reveal that he is not as

⁶ *Id.* at 165.

⁷ In his reply to the State's motion to dismiss, Villegas seems to have misunderstood my dissent in *Ex parte Henderson*, 246 S.W.3d 690 (Tex. Crim. App. 2007), which he cites for the proposition that, "At *this* juncture, however, the Applicant's facts are to be 'accepted as true.'" What I said in *Henderson* was, "The facts alleged in the present application, even if accepted as true, do not establish any of the exceptions listed in § 5." *Id.* at 692 (Keller, P.J., dissenting).

intellectually limited as he claims. For instance, in seventh grade English, he earned a grade of 77. Achievement test scores from 1988 show him in the 84th percentile in language and the 59th percentile in math. While it is true that some of his grades and achievement test scores are low, the higher scores are inconsistent with an IQ of 59.

Regarding frontal lobe functioning, Villegas's own expert witness at trial testified that, according to the Wisconsin Card Sorting Test, Villegas had "some mild deficits" but on that test "he was all within average range," showing no neurological deficit. This was not an IQ test, but it appears to be contrary to the allegation he now makes. The expert also testified that Villegas is not brain damaged.

A person with "a master's in social work" was hired as part of the defense team at trial. She interviewed members of Villegas's family. As far as the record shows, this person never heard any suggestion that Villegas was mentally retarded.

I think that we are not required to ignore the facts of the offense in determining whether an applicant has met the high burden imposed under *Blue*. In this case, before the murders, Villegas had been using crack cocaine with his ex-girlfriend. Her mother came home and told him to get out. He had already armed himself with a knife, and he stabbed the mother multiple times. Concerned about his ex-girlfriend's possible reaction to this, he retrieved another knife and stabbed her to death. Villegas also killed her three-year-old son, stabbing him nineteen times. Villegas then changed out of his clothes, took a television and his ex-girlfriend's car, pawned the t.v. to get money for drugs, and, after a high-speed chase, was caught by the police and confessed.

To obtain a remand under *Blue*, Villegas must establish to the requisite degree of certainty that not a single rational juror would believe anything other than that he is mentally retarded. I agree

with the Court that Villegas has failed to meet his burden.

Filed: April 14, 2014

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