



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NOS. WR-44,564-03 and WR-44,564-04

EX PARTE JOSEPH ROLAND LAVE

ON APPLICATIONS FOR WRITS OF HABEAS CORPUS
CAUSE NO. F93-03527-S IN THE 282ND JUDICIAL DISTRICT COURT
DALLAS COUNTY

Per Curiam. KELLER, P.J., and PRICE and KEASLER, JJ., not participating.

ORDER

These are subsequent post conviction applications for writs of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure article 11.071.

Applicant was convicted of capital murder in March 1994. The jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure article 37.071, and the trial court sentenced applicant to death. This Court affirmed applicant's conviction and sentence on direct appeal. *Lave v. State*, No. AP-71,897 (Tex. Crim. App. Nov. 20, 1996) (not designated for publication). On January 26, 1998, Applicant filed his initial post-

conviction application for writ of habeas corpus pursuant to Article 11.071. We denied relief. *Ex parte Lave*, No. WR-44,564-01 (Tex. Crim. App. Sept. 20, 2000) (not designated for publication).

Applicant filed a subsequent application in which he asserted that an accomplice's out-of-court statements were admitted in violation of *Crawford v. Washington*, 541 U.S. 36 (2004). We dismissed that application as an abuse of the writ on September 7, 2007. *Ex parte Lave*, No. WR-44,564-02 (Tex. Crim. App. Sept. 7, 2007) (not designated for publication). Applicant then filed a petition for writ of certiorari and an application for stay of execution in the United States Supreme Court. The Supreme Court granted the petition, vacated this Court's judgment, and remanded the case to this Court. *Lave v. Texas*, 128 S. Ct. 1442 (2008). On further consideration, we again dismissed the application as an abuse of the writ. *Ex parte Lave*, 257 S.W.3d 235 (Tex. Crim. App. 2008).

Applicant then filed a second subsequent application raising an allegation that he was denied a fair trial and due process when the State suppressed prior statements of his accomplice in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). We found that the allegation satisfied the requirements of Texas Code of Criminal Procedure article 11.071, Sec. 5(a). Accordingly, we remanded that application to the trial court, where it is currently under consideration.

Applicant has now filed a third subsequent application in which he raises six allegations. We have reviewed the application and cannot determine on the current record

whether the factual basis for allegations one through five – the surviving victim’s prior statement – was unavailable on the date that applicant filed his second subsequent application. Therefore, these allegations are remanded to the trial court so that the record can be supplemented with evidence relating to the Section 5 bar. Specifically, applicant shall have the opportunity to show when and how he obtained the evidence at issue and whether he exercised reasonable diligence to obtain this evidence at the earliest opportunity. Following receipt of this additional information, the trial court shall determine whether these allegations satisfy the requirements of Article 11.071, § 5. If appropriate, the trial court shall enter factual findings and credibility determinations. If the trial court determines that these allegations satisfy the requirements of Section 5, then the trial court shall address them on the merits.

Applicant’s sixth allegation is that he was denied a fair trial and due process by the State’s presentation of false expert testimony. We find that this allegation meets the requirements for consideration of a subsequent claim. This allegation is remanded to the convicting court for consideration on the merits.

Applicant’s third subsequent application shall be consolidated with his second subsequent application. Both applications will be held in abeyance pending the trial court’s compliance with this order. The trial court may resolve the issues using any means set forth in Texas Code of Criminal Procedure article 11.071. The trial court shall make any findings of fact and conclusions of law that it deems relevant and appropriate to the disposition of the

allegations. A supplemental transcript containing all affidavits and interrogatories or the transcription of the court reporter's notes from any hearing or deposition, along with the trial court's supplemental findings of fact and conclusions of law, shall be returned to this Court by August 1, 2013.¹

IT IS SO ORDERED THIS THE 10TH DAY OF APRIL, 2013.

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¹ Any extensions of time shall be obtained from this Court.