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No. WR-81,947-02

In The

Court of Criminal Appeals

Austin, Texas

Ex parte
Steve Herbert Speckman,

Applicant

Cause No. 0861282-A
In the 372nd District Court
Tarrant County, Texas

TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION AMICUS CURIAE BRIEF IN SUPPORT OF APPLICANT

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STATEMENT REGARDING APPEARANCE AS AMICUS CURIAE

The Texas Criminal Defense Lawyers Association (TCDLA) is a non-profit, voluntary, membership organization dedicated to the protection of those individual rights guaranteed by the state and federal constitutions and the constant improvement of the administration of criminal justice in the State of Texas. Founded in 1971, TCDLA currently has a membership of over 3,400 and offers a statewide forum for criminal defense counsel, providing a voice in the state legislative process in support of procedural fairness in criminal defense and forfeiture cases, as well as seeking to assist the courts by acting as amicus curiae.

Neither TCDLA nor any attorney representing TCDLA have received any fee or other compensation for preparing this brief.

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW, the Texas Criminal Defense Lawyers Association, *Amicus Curiae*, and respectfully submits this Amicus Curiae Brief in Support of Applicant and would show the Court as follows:

INTRODUCTION

The Court issued an order directing the parties to file briefs on three issues:

> (1) whether we should adopt a rebuttable presumption that a motion to dismiss an Article 11.07 application is unreasonable if the motion is filed in this Court or a trial court after a trial court has factually developed the record and made findings of fact and conclusions of law;
>
> (2) if this Court should adopt such a presumption, what factors this Court should consider when determining if an applicant has rebutted this presumption; and
>
> (3) what alternatives, other than a dismissal, are available to applicants who wish to dismiss their applications.

(Order, at *1 (Sept. 14, 2016))

As detailed below, the Court should decline to adopt even a rebuttable presumption disfavoring motions to dismiss filed subsequent to record develop and the entry of findings of fact and conclusions of law. Such a rule, which essentially creates dismissal with prejudice of habeas applications, would needlessly impose conditions on unrepresented litigants who already labor under a variety of difficult logistical and legal burdens. Neither the Court nor the State would enjoy any appreciable benefits of such a rule, especially in comparison to the hardship it would work on habeas applicants.

Moreover, the Court lacks authority to create the rule, as the express grants of power, along with comparable areas of civil and criminal law instruct against a procedural rule disfavoring a habeas applicant. In the event the Court does, however, decide to create the proposed rule, it should impose a multitude of factors heavily disfavoring wide-scale application of the rule. The proposed rule ought to be rejected. But if it is adopted, and because it so greatly disfavors habeas applicants, it out to be used sparingly.

ARGUMENT

I. TO ADOPT EVEN A REBUTTABLE PRESUMPTION AGAINST A MOTION TO DISMISS WOULD NEEDLESSLY WORK A HARDSHIP ON PRO SE LITIGANTS AND SERVE LITTLE BENEFIT TO THE STATE OR COURT

In 2015, there were 4,698 habeas corpus applications filed with the Court. Annual Statistical Report for the Texas Judiciary, Fiscal Year 2015, Court of Criminal Appeals Activity Report, Detail 4, *available at* http://www.txcourts.gov/media/1308021/2015-ar-statistical-print.pdf. The vast majority of those applications were filed by pro se litigants confined in the Texas Department of Criminal Justice (TDCJ), i.e. prison or state jail.

The average TDCJ inmate has an Educational Achievement Score slightly higher than that of a fourteen-year-old eighth grader. Texas Department of Criminal Justice, Statistical Report Fiscal Year 2015, at 1 (2015). Assuming these prisoners are part of the general population at their unit of confinement, they have the "opportunity" to access the law library for up to ten hours a week as long as such attendance coordinates with their work and other mandatory schedules. Texas Department of Criminal Justice, Offender Orientation Handbook, at 123 (April 2016). If the inmate is in administrative segregation, he may not go to the law library at all. *Id.* 124. He may instead request "up to three items of legal research materials per day, delivered on three alternating days per week." *Id.*

A prison law library does not offer the advanced online searchable databases to which attorneys are now accustomed. They are instead comprised of the traditional reporters and statutory books. *Id.* 121-23. There is no computer on which to copy and paste the relevant portions instructive on the issue being researched. *Id.* at 123. A prisoner's arduous task of taking notes and drafting pleadings is relegated to handwriting with a pen and paper.

Even if a prisoner had access to computers and legal databases, he would likely remain severely handicapped in knowing where to begin. After all, even highly educated and exceedingly intelligent attorneys with quick access to caselaw and a multitude of secondary resources have difficulty understanding the contours of habeas law. Without any legal training, a prisoner may understandably be at a total loss—unaware of both the substantive and procedural rules governing his pleadings. *Martinez v. Ryan*, 132 S. Ct. 1309, 1317, 182 L. Ed. 2d 272 (2012).

For example, a claim of ineffective assistance of counsel is very common in habeas. There are a litany of cases specific just to this one issue in habeas law. In order to present a viable ineffective assistance of counsel claim, an applicant must make a particularized showing of both deficient performance and prejudice. These standards are "likely too demanding for an imprisoned layman to meet." *Ex parte Golmon*, __ S.W.3d. __, No. WR-77,724-02, 2016 WL 5112948, at *1 (Tex. Crim. App. Sept. 21, 2016) (Alcala, J., concurring). The problem is compounded with more obscure habeas claims, the research and understanding of which is all the more onerous.

It is difficult to contemplate filing legal pleadings with the limited materials, time, education, and understanding of the average prison inmate. Understanding a case and the law well enough to adequately fill out just the 11.07 form is something perhaps expected of a first-year law student; not an eighth grader. It is almost unfathomable that such a person who is altogether barred from the library could possibly know what to request to even begin putting together a habeas application.

On top of these difficulties is the fact habeas applicants are only afforded review on the merits of the first state habeas petition they file. *See* TEX. CODE CRIM. PROC. ANN. art. 11.07 § 4; *Ex parte Saenz*, 491 S.W.3d 819, 824 (Tex. Crim. App. 2016), reh'g denied (June 15, 2016) (discussing how Section 4 "was intended to limit a convicted person seeking post-conviction habeas relief to 'one bite at the apple'").

It is reasonable to imagine a prisoner botching his first habeas application and then discovering his errors. At that point, and with the severe limitations on both resources and time imposed on a prisoner, the most reasonable action may very well be for the prisoner to dismiss the application altogether so that he can redraw his entire application.

The application may suffer from errors so severe an amendment is insufficient. And even if an amendment were adequate, a prisoner simply may not have the time to research out and file the amendment before the Court rules on the application.

The problem becomes all the more vexing when an attorney enters into the litigation after the inmate has already filed his habeas application. If an attorney comes in at that point, he or she will likely find errors in the pro se habeas application. The Court's proposed rule would tie that attorney's hands significantly. The attorney would be forced between deciding whether to proceed with a deficient application or file a motion to dismiss and risk being forever barred from filing a proper application.[1]

[1] This problem is a reflection of two major failings in the system: a time too short for filing a motion for new trial and a rule denying the appointment of counsel on habeas. The point in time where an applicant could develop the record in his case with the assistance of an attorney is immediately after his trial, before the time for filing a motion for new trial has expired. Unfortunately, because the motion for new trial deadline is so short, and because the trial court's loss of jurisdiction is automatic and irrevocable, an attorney often has insufficient time to properly develop a record. This means record development is relegated to habeas, where there is no right to an attorney. Not having the assistance of an attorney unsurprisingly leads to applications that are so poorly or incorrectly pled dismissal and re-pleading is the best option.

As a final consideration, the Court has increasingly used laches to procedurally bar habeas applications. *See Ex parte Smith*, 444 S.W.3d 661, 663 (Tex. Crim. App. 2014). The habeas applicant who seeks to dismiss and refile his habeas petition is already faced with the possibility of laches barring his second application. The possibility of laches preventing a re-filing of the application is, alone, sufficient to protect any interests implicated by an applicant's lack of diligence.

The rule the Court is considering would impose these potentially serious impediments for very little benefit. In the scenario proposed by the Court, after obtaining dismissal of his first habeas application the applicant may either (i) never re-file his application; (ii) re-file it in the exact same form as before; or (iii) re-file it in some corrected form.

If the applicant takes either of the first two options, there is no to very little additional work required from the trial court, this Court, any clerks, or the State. If the application is corrected and re-filed, there may still not be any additional work required. This would occur if, for example, the re-filed application omitted claims previously presented or if it based new claims upon evidence already gathered during the record development and compilation of the first application.

The most new work would occur if the re-pled application raises issues legitimately requiring additional record development and fact findings. Realistically, it seems unlikely this would be a common occurrence. But even if it were, validating a conviction ought to be done upon a complete knowledge of all the relevant facts—a position already acknowledged by the Legislature. *See* TEX. CODE CRIM. PROC. ANN. art. 11.07 § 3(d) (establishing the procedure for the trial court's designation of issues of fact and of record development on those issues). If a viable claim is presented, no court should be reticent about hearing the claim and allowing a petitioner to develop the record in regards to that claim. *See id.*

The rule considered by the Court would serve to impose yet another burden on the already severely and disproportionately burdened habeas applicant. There are likely some litigants who are utilizing the motion to dismiss as a means to avoid the successive applications bar of Article 11.07, Section 4. The solution to vexatious and abusive litigants is not to punish all litigants in the hopes of getting to the abusive ones. Rather, it is to on a case-by-case basis address and handle the antics of the occasional abusive litigant.

The Court ought to resist the urge of imposing a rule aimed at abusive litigants—who comprise a very small portion of those who would be impacted—that would impact both innocent and abusive litigants alike. This is all the more true when the rule, even in the case of an abusive litigant, would likely be of very little benefit to either the State or any courts. Its potential risks are intolerable when compared to the slightness of any corresponding benefits.

II. CREATING A RULE BARRING POTENTIALLY MERITORIOUS HABEAS PETITIONS ON PROCEDURAL GROUNDS ALONE IS AN ACTION BETTER LEFT TO THE LEGISLATURE

It is well-settled a court's authority to act springs from one of four sources: a constitutional provision, a statute, the common law, or its inherent and implied powers. *State v. Johnson*, 821 S.W.2d 609, 612 (Tex. Crim. App. 1991); *Garcia v. Dial*, 596 S.W.2d 524, 527-28 (Tex. Crim. App. 1980); *Eichelberger v. Eichelberger*, 582 S.W.2d 395, 398-99 (Tex. 1979); *Pope v. Ferguson*, 445 S.W.2d 950 (Tex. 1969).

In this case, the Court asks whether it ought to adopt a proposed rule which would create a presumption disfavoring motions to dismiss filed subsequent to record development in habeas corpus cases.

Before the Court determines the efficacy of the proposed rule, however, it must first assure itself of its own authority to create the rule in the first place. Review of the four sources of power indicates the Court lacks authority to institute a wholesale presumption disfavoring motions to dismiss in habeas cases.

A. There is No Constitutional Authority for the Court to Create the Proposed Rule

In the Separation of Powers Clause, the Texas Constitution delineates the authority of each of the three branches of Texas government. TEX. CONST. art. II § 1. There are two primary ways the Separation of Powers provision is violated: (i) when one branch assumes, to whatever degree, a power that is "more properly attached" to another branch or (ii) when one branch unduly interferes with another. *Ex parte Lo*, 424 S.W.3d 10, 28 (Tex. Crim. App. 2013).

The Texas Constitution grants this Court and its Judges "the power to issue the writ of habeas corpus." TEX. CONST. art. 5, § 5. It subjects that power, however, to "such regulations as may be prescribed by law." *Id.* The Constitution additionally expressly grants the Legislature sole authority to "enact laws to render the [habeas corpus] remedy speedy and effectual." TEX. CONST. art. I, § 12.

"Thus, by constitutional mandate, the Legislature is empowered to enact, and obviously has enacted, laws effecting the implementation of the right to writ of habeas corpus." *Ex parte Davis*, 947 S.W.2d 216, 219 (Tex. Crim. App. 1996). Those laws are discussed in the section immediately below. The instruction of the Constitution, however, remains: only the Legislature has constitutional authority to enact laws governing habeas corpus cases. Were the Court to create a presumption not interpreting an already existing provision but essentially creating a new rule, it would be treading on an area more properly attached, by virtue of the Texas Constitution, to the Legislature. *See Lo*, 424 S.W.3d at 28.

B. Statutory and Common Law Instruct Against the Court's Authority to Create the Proposed Rule

1. The Proposed Rule Would Be Contrary to Article 11.07 and Article 11.04

The Government Code also grants the Court "rulemaking power to promulgate rules of post-trial, appellate, and review procedure in criminal cases." TEX. GOV'T CODE ANN. § 22.108. That provision specifies, however, the Court's rules "may not abridge, enlarge, or modify the substantive rights of a litigant." *Id.*

The substantive rights of a habeas petitioner are delineated in Article 11.07 of the Texas Code of Criminal Procedure. Nothing in any part of Article 11.07 indicates the Court ought to treat a motion to dismiss with disfavor. Had the Legislature sought to impose such a presumption, it had more than one opportunity in the statute to do so. Section 3(d) provides the applicant with the right to record development if the trial court determines there are "controverted, previously unresolved facts material to the legality of the applicant's confinement." TEX. CODE CRIM. PROC. ANN. art. 11.07 § 3(d).

Had the Legislature thought it prudent to impose a presumption against a motion to dismiss field after record development then it could have inserted such language in that provision. It did not. The omission bespeaks not only the wisdom of avoiding such limitations but also inherently indicates the power to impose such rules lies with the Legislature alone.

Additionally, Section 4 provides for the one situation in which the Court can adversely treat abusive litigants: after a habeas action has already been fully litigated. There is no provision for dismissal simply past the record development and trial court recommendation stage.

Finally, Article 11.04 establishes "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. ANN. art. 11.04.

2. The Court Otherwise Lacks Statutory Authority to Create the Proposed Rule

The Government Code vests the Court with "all powers necessary for the exercise of its jurisdiction and the enforcement of its lawful orders, including authority to issue the writs and orders necessary or proper in aid of its jurisdiction." TEX. GOV'T CODE ANN. § 21.001. The proposed rule, however, has little to do with the Court's jurisdiction. There are no orders to enforce. This statutory provision does not support the Court's authority to create the proposed rule.

C. The Proposed Rule Exceeds the Traditional Bounds of the Court's Inherent and Implied Powers

In addition to specific power to act conferred by the constitution, statute, or common law, all courts have inherent and implied authority to take certain actions. *State v. Johnson*, 821 S.W.2d 609, 612 (Tex. Crim. App. 1991). Inherent and implied powers are distinct.

Under its inherent powers, a court may take actions that "aid in the exercise of its jurisdiction, in the administration of justice, and in the preservation of its independence and integrity." *Eichelberger*, 582 S.W.2d at 398. Implied powers are "those which can and ought to be implied from an express grant of power." *Id.* at 399. For example, when a state court ruling or conviction conflicts with a holding by the United States Supreme Court, this Court may resolve the discord by utilizing its implied power *a la* its express power over the appellate courts and over convictions. *See id.*; *Ex parte Briseno*, 135 S.W.3d 1, 5 (Tex. Crim. App. 2004). The question presented in the instant case is whether presuming a motion to dismiss as unreasonable subsequent to record development falls under the Court's inherent or implied powers.

1. Wholesale Creation of a Presumption in Favor of Dismissal With Prejudice Is Outside the Case-Specific Invocation of Implied Power

Traditionally, actions done as a form of punishment fall under a court's implied powers. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 49, 111 S. Ct. 2123, 2135, 115 L. Ed. 2d 27 (1991) (holding the ability to impose sanctions for bad-faith conduct fell under the court's inherent power); *Link v. Wabash R. Co.*, 370 U.S. 626, 630, 82 S. Ct. 1386, 1389,

8 L. Ed. 2d 734 (1962) (noting "[t]he authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an 'inherent power'"). Interpreting dismissal of a case with prejudice as a sanction, such action may be properly classified as an exercise of the Court's inherent power.

The distinctive characteristic of "inherent power" invocation is its singularity. Justification of court action as an exercise of its inherent power traditionally occurs in specific cases where the court deems conduct within the realm of the individual case to be abusive. For example, in *Chambers*, the Supreme Court detailed how a long and intentional pattern of misconduct, along with the court's many warnings, justified the courts exercise of its inherent power in sanctioning counsel. *Chambers*, 501 U.S. at 38, 111 S. Ct. at 2129. Similarly, in *Link*, the Supreme Court approved the trial court's exercise of its inherent power to dismiss after counsel repeatedly failed to appear. *Link*, 370 U.S. at 629, 82 S. Ct. at 1388. In *Brager*, this Court held it was within the lower court's inherent power to dismiss the case of a litigant with a long pattern of abusive conduct. *Brager v. State*, No. 0365-03, 2004 WL 3093237, at * 1 (Tex. Crim. App. Oct. 13, 2004).

The fact that invocation of a court's inherent power must apply on a case-by-case basis is further cemented by the Supreme Court "recogni[tion]] that invocation of the inherent power would require a finding of bad faith." *Chambers*, 501 U.S. at 49, 111 S. Ct. at 2135 (citing *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 767, 100 S.Ct. 2455, 2464, 65 L.Ed.2d 488 (1980)). This is a case-specific determination.

Thus inherent power is a sword a court many use to the extent necessary to deter, alleviate, or counteract bad faith abuse of the judicial process. "Accordingly, for inherent power to apply, there must be some evidence and factual findings that the conduct complained of significantly interfered with the court's legitimate exercise" of its core functions. *Kutch v. Del Mar Coll.*, 831 S.W.2d 506, 510 (Tex. App.—Corpus Christi 1992, no pet.).

In in the instant case, the Court lacks the inherent power to create a sweeping rule applying to all cases that are and are to come. The brush of inherent power cannot paint with such broad strokes. At the same time, however, the Court may, in a particularly egregious case, still rely upon its inherent power to circumscribe the ability of a habeas applicant to seek dismissal without prejudice.

There is no authority, however, for the Court to impose a sweeping rule across all habeas litigants without any consideration of case-by-case factors. The proposed rule cannot be imposed as part of the authority of the Court's inherent powers.

2. Because the Express Authorities Mandate the Court Must Protect the Procedural Rights of the Habeas Applicant, the Court Lacks Any Implied Power to Create a Presumption in Favor of Dismissal With Prejudice

Implied power is derived from express grants of power. *Eichelberger*, 582 S.W.2d at 399. Article 5 Section 5 of the Texas Constitution along with Chapter 11 of the Texas Code of Criminal Procedure creates the Court's express power to act in habeas. Both of those sources firmly establish the sanctity of the habeas corpus action. The Bill of Rights in the Texas Constitution establishes "[t]he writ of habeas corpus is a writ of right, and shall never be suspended." TEX. CONST. art. I, § 12. Article 11.04 mandates "[e]very 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. ANN. art. 11.04. From a procedural aspect, the relevant express powers only authorize the Court to act favorably toward a habeas applicant.

Granting a motion to dismiss *without* prejudice so that an applicant might correct errors in his first application is an act favorable to the applicant. Consequently, the Court has the implied authority to grant a motion to dismiss without prejudice. Creating a presumption in favor of dismissal *with* prejudice, in juxtaposition, is an act clearly unfavorable to a habeas applicant. As such, it is contrary to the express provisions establishing this Court's authority to act. The Court has the implied power to create procedural rules in favor of the habeas applicant. It does not have any implied power to create a procedural rule, such as the one proposed in this case, that would work against the habeas applicant.

III. A RULE PRESUMING A MOTION TO DISMISS IS UNREASONABLE WOULD BE INCONSISTENT WITH EXISTING CRIMINAL AND CIVIL DISMISSAL STATUTES

Longstanding civil and criminal practice reinforce the idea that the person who brings a complaint is the master of it. *See Anderson v. American Airlines, Inc.*, 2 F.3d 590, 593 (5th Cir. 1993) ("It is axiomatic that the plaintiff is the master of his or her complaint."). In Texas civil law, "[a]t any time before the plaintiff has introduced all of his evidence other than rebuttal evidence, the plaintiff may dismiss a case, or take a

non-suit." TEX. R. CIV. P. 162. A voluntary nonsuit is without prejudice, and the same plaintiffs, by a subsequently filed suit, can seek relief identical to that sought in the nonsuited action. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 863 (Tex. 2010). Moreover, granting a nonsuit is a ministerial act. *Id.* (stating "a trial court is without discretion to refuse an order dismissing a case because of a nonsuit . . .").

Similarly, in the criminal arena, a prosecutor "may, by permission of the court, dismiss a criminal action at any time." TEX. CODE CRIM. PROC. ANN. art. 32.02. If the dismissal occurs before double jeopardy has attached, there is nothing preventing the prosecutor from re-indicting the defendant on the same offense. *Proctor v. State*, 841 S.W.2d 1, 4 (Tex. Crim. App. 1992).

In fact, a trial court will dismiss the charging instrument with prejudice only upon finding that the defendant's *constitutional right* to a speedy trial right was "actually violated." *Cantu v. State*, 253 S.W.3d 273, 281 (Tex. Crim. App. 2008). The Court has recognized dismissal with prejudice for the "radical remedy" that it is. *Id.* And that was in the context of potential violation of constitutional rights.

It is incongruous to say everyone *but* a habeas applicant is the master of his case. This disproportionate treatment is particularly bothersome considering the fact that, unlike the latitude afforded attorneys in civil law and prosecutors, habeas applicants only have one opportunity for substantive review of their convictions. *See* TEX. CODE CRIM. PROC. ANN. art. 11.07 § 4. If the law allows similarly situated "complainants" the ability to dismiss and re-plead their case, then habeas applicants ought to at least be afforded comparable leeway.

Most importantly, however, is the violence the proposed rule would do to a bedrock principle of American criminal jurisprudence: The government is exponentially more powerful than any one of its citizens, and because of this the average person must be diligently protected from the government. This understanding is why the Federal Constitution's Bill of Rights is crafted as a series of prohibitions on the government. A rule of dismissal with prejudice crafted to work *against* the individual and *in favor of* the State casts this principle aside. From the Exclusionary Rule to the Double Jeopardy Clause, a major theme of criminal law is protection of the individual even at the expense of the state. The state does not get primary consideration; the individual does.

The proposed rule undermines this basic tenant of law, i.e. protection of the individual. It does so without basis. A rule singling out habeas applicants and disgorging them of the legal maneuverings traditionally enjoyed by those presenting claims to the court is unjustified.

Indeed, perhaps recognition of this otherwise well-accepted principle is why the Legislature has never gone so far as the Court now proposes. *See* TEX. CODE CRIM. PROC. ANN. art. 11.04 ("Every provision relating to the writ of habeas corpus shall be most favorably construed in order to . . . protect the rights of the person seeking relief under it.").

IV. THE PROPOSED RULE WOULD REQUIRE THE FEDERAL COURTS TO DEVELOP THE RECORD, EVEN THOUGH SUCH A TASK IS BEST SUITED TO THE STATE COURTS

Finally, the Court should consider the impact the proposed rule would have on additional habeas review of the case in federal court. A federal court analyzing a habeas claim arising from a state conviction is severely restricted when it reviews a claim that was "adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d); *Cullen v. Pinholster*, 563 U.S. 170, 181, 131 S. Ct. 1388, 1398, 179 L. Ed. 2d 557 (2011).

Usually, the review of a federal court considering the habeas petition of a state inmate "is limited to the record that was before the state court that adjudicated the claim on the merits." *Pinholster*, 563 U.S. at 181, 131 S. Ct. at 1398. On the other hand, if a claim was not adjudicated on the merits in state habeas, the federal court is permitted to conduct its own investigations into the substance of the claims, which includes conducting evidentiary hearings of its own. The state court's decision is not entitled to the same deference as a merits-based determination. *Fisher v. Texas*, 169 F.3d 295, 300 (5th Cir. 1999) (refusing to apply the federal habeas deference standards to the state court's decision when that decision was based on procedural grounds).

If the Court were to create a procedural presumption inventing a motion to dismiss a habeas application with prejudice, it would permit the federal courts to delve into its own development of the record. *See Harrington v. Richter*, 562 U.S. 86, 99, 131 S. Ct. 770, 784–85, 178 L. Ed. 2d 624 (2011) ("When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.").

Simply put, a conviction is not nearly as assailable in federal habeas if the Court passes upon its merits. A dismissal with prejudice, however, is not a ruling on the merits. Imposition of such a procedural bar by the state court means the federal court would then be required to develop a record on the petitioner's pleadings. The high standards that otherwise protect a claim denied on the merits in state court would not be applicable in such a case. As a result, the underlying state conviction becomes much more vulnerable to attack in federal habeas proceedings.

V. FACTORS INFORMING THE PRESUMPTION A MOTION TO DISMISS SUBSEQUENT TO RECORD DEVELOPMENT IS UNREASONABLE

The Court requested briefing on what factors it should consider were it to adopt the proposed rebuttable presumption against motions to dismiss. It is difficult to articulate factors which could support such a rule without knowing why the Court would design the rule in the first place. Reason dictates any factors must be tailored to the ills the rule seeks to redress, yet the Court's order sheds little light on the motivation for the proposed rule. Nevertheless, were the Court to adopt the proposed rule, there are other bodies of law similar to that of a dismissal with prejudice where the Court has created and discussed which factors may guide a reviewing court's determination.

First and foremost, however, the Court ought to consider whether the applicant seeking to dismiss the application is represented by an attorney. If an attorney, as an officer of the court, represents that dismissal is necessary for the case and is not done as an abuse of process, the Court ought to treat such a representation with very high regard.

There are other factors that court inform a court's analysis in addition to whether the applicant is represented. Assuming the point of the rule would be to address abusive litigants, then the factors would focus on the litigant's justifications for dismissal. They might consider how diligently the litigant has pursued his claims and whether he has a demonstrated pattern of abusive and vexatious litigation.

If the point is a concern for prejudice to the State, then the factors would look toward the State for an articulation of how, or whether, dismissal without prejudice adversely impacts it. If the rule would be a creation for the benefit of the courts, then relevant factors would include the amount of work already done by the courts and how much a dismissal without prejudice would negatively impact judicial economy or otherwise frustrate the actions already taken by the courts.

An additional factor relevant to implications on the State and the courts is the amount of record development. The record development in a case up to the point of dismissal may consist of nothing more than the gathering of a few affidavits (if that). Alternatively, it may consist of lengthy hearings with substantial testimony and evidence development. The amount of time already devoted to a claim may inform the decision as to whether granting a motion to dismiss without prejudice would work a hardship on either the State or the trial court.

Finally, perhaps the most analogous situation to the one at hand is that of when a reviewing court is tasked with determining whether a person's constitutional speedy trial rights have been violated and thus whether the indictment against him ought to be dismissed with prejudice. The Supreme Court enunciated four factors to guide such an analysis: (i) the length of the delay; (ii) the reason for the delay; (iii) the defendant's assertion of his right to a speedy trial; and (iv) prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101 (1972). Adopting those factors to the situation at hand, similar factors to consider would be (i) how far the case has advanced in the system; (ii) the reason the applicant seeks to dismiss his case; (iii)

whether and why the State opposes the dismissal; and (iv) the amount of actual prejudice dismissal will work upon on the State.[2]

By virtue of both constitutional and statutory mandate, the Court should be strongly disinclined to create a rule imposing yet another burden on unrepresented litigants. If it does create such a rule, however, it ought to create a series of factors designed to protect the non-abusive litigant. The factors need to be such that the rule will only be applied sparingly—and only in those cases most deserving of the extreme sanction proposed.

PRAYER

The Texas Criminal Defense Lawyers Association, amicus curiae in the above styled and numbered cause respectfully prays the Court will decline to adopt a rebuttable presumption that a motion to dismiss an Article 11.07 application is unreasonable if the motion is filed subsequent to record development and entering of findings of fact and conclusions of law.

[2] These factors are also comparable to those involved in the determination of whether laches may bar a habeas claim. *See Ex parte Smith*, 444 S.W.3d 661, 667 (Tex. Crim. App. 2014)

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CERTIFICATE OF SERVICE

I certify that on December 13, 2016, a copy of this brief was served on Andrea Jacobs, attorney for the State of Texas, and Jim Gibson, attorney for Applicant Steve Speckman, via the e-mail address each attorney has listed with the state e-filing system.

/s/ Allison Clayton
Allison Clayton

CERTIFICATE OF COMPLIANCE

I certify the foregoing Amicus Brief complies with Rule 9.4(i)(2)(B) of the Texas Rules of Appellate Procedure. The brief, excluding those portions detailed in Rule 9.4(i) of the Texas Rules of Appellate Procedure, is 5,429 words long. I have relied upon the word count function of Microsoft Word, which is the computer program used to prepare this document, in making this representation.

/s/ Allison Clayton
Allison Clayton