

No.

IN THE
SUPREME COURT OF THE UNITED STATES

Ricky Bona CHHEA - Petitioner

vs.

SUPERINTENDENT of Mahanoy, et. al., - Respondent

Petition for Writ of Certiorari
On Appeal from the United States Court of Appeals
For the Third Circuit

Petition for Writ of Certiorari
Criminal Case

Ricky Bona Chhea, Petitioner*
SCI: MAHANOY
301 Morea Road
Frackville, PA 17932

July 17, 2018

*Pro Se

QUESTION PRESENTED

1. IS EQUITABLE TOLLING WARRANTED, WHERE A PETITIONER IS DENIED ACCESS TO THE NOTES OF TESTIMONY AND DISCOVERY, EVEN AFTER PROPERLY AND TIMELY INVOKING HIS RIGHT TO APPEAL WITHIN THE SCOPE OF AEDPA ONE (1) YEAR STATUTE OF LIMITATIONS?

Suggested Answer: Yes.

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the Court whose judgment is the subject of this petition is as follows:

Theresa DeLbaso, Superintendent - SCI: MAHANOY

Philadelphia County (PA) District Attorney's Office

United States Attorney's Office of Eastern Pennsylvania

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Appendix BB: Opinion of the United States Court of Appeals, 3rd Circuit.

Appendix CC: Opinion of the District Court of Eastern Pennsylvania.

Appendix DD: Opinion of the Superior Court of PA, Eastern District.

Appendix EE: Opinion of the PCRA/Trial Court of Common Pleas, Philadelphia.

Appendix A: Statement of the Petitioner Ricky Bona Chhea.

Appendix B: Numerous Request for Assistance by the Petitioner Ricky Bona Chhea.

Appendix C: Complaint & Response to the Disciplinary Board of PA.

Appendix D: Letter from Former Counsel forwarding legal materials.

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari be issued to review the judgments below.

OPINIONS BELOW

The Opinion of the Petition for Rehearing in the United States Court of Appeals, for the Third Circuit, appears at **APPENDIX AA**.

The Opinion of the United States Court of Appeals, appears at **APPENDIX BB**.

The Opinion of the United States District Court for the Eastern District of PA, appears at **APPENDIX CC**.

The Opinion of the Superior Court of PA, Eastern District, appears at **APPENDIX DD**.

The Opinion of the PCRA Court/Court of Common Pleas Philadelphia County, appears at **APPENDIX EE**.

JURISDICTION

The date on which the United States Court of Appeals decided my case was February 13, 2018*, and appears at **APPENDIX BB**.

A timely Petition for Rehearing was denied by the United States Court of Appeals for the Third Circuit on April 20, 2018** and a copy of the Order denying rehearing appears at **APPENDIX AA**.

The JURISDICTION of this Court is invoked under 28 U.S.C. § 1245(1).

* While the Order by the Court of Appeals was dated February 13, 2018, the Petitioner did not receive said document until February 16, 2018 through SCI: MAHANOY's Inmate Legal Mail Distribution System.

** While the Order denying Petition for Rehearing is dated April 20, 2018, Petitioner Chhea did not receive said document until April 25, 2018 through SCI: Mahanoy's Inmate Legal Mail Distribution System.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment of the United States Constitution: "....be deprived of life, liberty or property without due process of law."

Sixth Amendment of the United States Constitution: "....right to effective assistance of counsel..." and "...right to a fair trial under the due process clause....".

Eighth Amendment of the United States Constitution: "....prohibitingcruel and unusual punishment."

Fourteenth Amendment of the United States Constitution: "....right to due process of law..."

Title 28 U.S.C. § 2244 & 2254

Anti-Terrorism Effective Death Penalty Act (AEDPA)

STATEMENT OF THE CASE

Factual and Procedural History.

The Factual History of this case revolves around the shooting and death of Ratseiey "Yun" Yun. Shortly, before two o'clock in the morning on July 27, 2008, Yun was lured from his home on the 1800 block of South 15th Street and directed around the corner of Yun's home where he would be shot multiple times. As a result of the sound of gunfire and/or gunshots, Philadelphia Police would report to the intersections of 15th and Moore Street in Philadelphia. Arriving at 1810 South 15th Street, Officer James Dougherty found the victim, Yun, lying on the ground and bleeding from multiple gunshot wounds. Yun declared in the presence of his Mother and Officer Dougherty, that he was dying and repeatedly said that a male by the name of Sophana "Sovann" Sovann shot him. Both Yun and his Mother directed the Police to Sovann's address, 1819 S. 15th Street, three houses away.

Yun would be transported to Thomas Jefferson University Hospital and from the direct result of Yun's declaration the resident of 1819 S. 15th Street and its occupants would be detained by Police as they entered the home without a warrant. The Residence and Occupants of 1819 S. 15th Street were ordered by the Police to come into the living room to remain in the sight of the Officers who were present in the house, with the exception of a baby and elderly woman who was allowed to remain in the rooms they occupied on the second floor. Sophana Sovann would be identified amongst the group of males in the residence, and placed in handcuffs and transported by the Police elsewhere.

The Petitioner, Ricky Chhea, a Minor at the time, was part of the group of males detained by the Police in the Residence, in which Chhea

would later be taken into custody, as he was handcuffed and brought to the Police Station in a Police Car by Two Officers.

Shortly thereafter, Yun was pronounced dead at the Hospital. He had been shot twice in the chest, back, and right arm, once each in the buttocks and heel of his right foot (Motion Hearing N.T. 1/6/10, pp. 70-74, 91-93, 172; 1/7/10, pp. 101; 1/8/10, pp. 10, 13-16).

Petitioner Ricky Chhea while in custody of the Philadelphia Police, who were fully aware that Chhea was a minor, made attempts to contact Chhea's parents with no success, continuing to question the Minor Defendant. Chhea would initially deny any involvement in the shooting, but ultimately confessed to having shot the victim with Sovann (See **APPENDIX A: Statement of Ricky Chhea**; Motion Hearing N.T. 1/4/10, pp. 12, 19, 29, 35-42; 1/8/10, pp. 101-21; Commonwealth Trial Exhibits C-54).

Petitioner Chhea and Sovann were tried jointly by a jury sitting before the Honorable Gwendolyn N. Bright. At Trial, the Commonwealth presented evidence that included a statement from the man who had lured the victim out of his home at Sovann's behest (N.T. 1/6/10, pp. 125-32, 138-56); Chhea's confession to shooting the victim (N.T. 1/8/10, pp. 101-20); Sovann's confession to shooting the Victim (N.T. 1/8/10, pp. 61-81); and statements from Sovann's girlfriend and a friend that Sovann and Chhea had confessed to the shooting moments after it had taken place (N.T. 1/7/10, pp. 63-64, 111-113). Chhea did not testify at his joint trial, where Sovann invoked the right to do so, describing his former affiliations with a gang and the victim. Further admitting that he (Sovann) and the Petitioner shot the victim. Sovann claimed that he had acted out of anger at the victim's purported mistreatment of him after he had left the gang (N.T. 1/11/10, pp. 67-97).

On January 14, 2010, the jury found defendant Chhea guilty of third-degree murder, conspiracy, and possession of a firearm by a minor. On March 26, 2010, Judge Bright sentenced defendant to a term of eighteen to thirty-six years of imprisonment for murder, a consecutive term of eight to sixteen years for conspiracy, and a concurrent term of two and one-half to five years for violating the uniform firearms act. Petitioner appealed. A Panel of the Superior Court affirmed the judgments of sentence on September 14, 2011 (Commonwealth v. Chhea, 1319 EDA 2010). The Pennsylvania Supreme Court denied Allocatur on March 29, 2012 (Commonwealth v. Chhea, 606 EAL 2011).

In September 2012, Chhea would file a timely Pro Se PCRA Petition. In it, only able to checked boxes on the PCRA form indicating that his constitutional rights had been violated, that Trial Counsel had rendered ineffective assistance, that his sentence was illegal (PCRA Petition at 2).

Chhea would also enclosed a Memorandum of Law in Support of PCRA with related motions, requesting but not limited to Notes of Testimony and Discovery.

The PCRA Court would appoint Lee Mandell, Esq., to represent Chhea. On March 6, 2014, PCRA Counsel Mandell would file a "no merit" letter pursuant to Commonwealth v. Finley, 644 A.2d 204 (Pa. Super 1998) (En Banc), and moved to withdraw representation.

Shortly after, the PCRA Court notified Chhea of the Court's intent to dismiss the PCRA petition pursuant to PA. R. Crim. P. 907. Petitioner Chhea would timely object in a Pro Se Response in opposition to the 907 notice. In said pleading, reiterated his right to appeal under state and federal constitutional law, and further the requirement of the PCRA Court to furnish Chhea a copy of the Notes of Testimony and Discovery, as no Party involved would produce a duplicate of legal materials for Chhea to effectively

file an appeal. On June 13, 2014, the PCRA Court dismissed Petitioner's PCRA Petition, denying all motions/request for notes of testimony and discovery, and permitted PCRA Counsel Mandell to withdraw representation.

Chhea would timely appeal to the Superior Court requesting for relief of remand to the Lower (PCRA) Court for Notes of Testimony and Discovery. The PcrA Court would file its opinion opposing relief (See APPENDIX EE). On June 23, 2015, the Superior Court affirmed in a non-precedential decision (Commonwealth v. Chhea, 2043 EDA 2014; See APPENDIX DD.

Before, during and after the denial of Petitioner Chhea's state appeals, where he could not effectively appeal his case without the aforementioned legal materials. The Petitioner would enlist the help of the Disciplinary Board of the Supreme Court of Pennsylvania. On February 7, 2016, Chhea would seek the assistance of the Office of Disciplinary Counsel, Philadelphia, PA., who after numerous correspondence back and forth, on April 5, 2016, was able to persuade Chhea's former trial counsel Richard T. Brown, Esq., to forward a copy of the notes of testimony and discovery, and only after all state appeals were denied.

On May 23, 2016, Chhea filed his first federal habeas petition in which later he forwarded a memorandum of law in support of petition. The Commonwealth would Answer alleging the petition was untimely without addressing the constitutional claims alleged by the Petitioner. Chhea timely Reply asserting he was entitled to equitable tolling due to the indifference of the parties in failure to turn over the requested legal materials.

On September 18, 2017 the District Court adopted the R&R of the Magistrate Judge and denied the Petition for Writ of Habeas Corpus as untimely (see APPENDIX CC). The Petitioner appealed. The Court of Appeals for the Third Circuit affirmed on February 13, 2018 (see APPENDIX BB).

Rehearing denied on April 20, 2018 (see APPENDIX AA).

This Petition for Writ of Certiorari is timely presented to this Supreme Court, as your Petitioner Ricky Bona Chhea prays this Court grant relief for the following reasons:

REASON FOR GRANTING THE PETITION

AND NOW COMES, Ricky Bona Chhea, Pro Se, who ask that this Writ of Certiorari be GRANTED, in light of the fact Chhea is a uncounseled litigant, he respectfully request the Supreme Court to construe the pleading before them liberally, as any arguments, assertions or claims made are without the aide of counsel, nor should be held to such high standard of counseled litigants. See *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594 (1972) (Per Curiam). The Movant offers the following of said requests for relief:

The Petitioner, Ricky B. Chhea, believes he is held in violations of Fifth, Sixth, Eighth and Fourteenth Amendment rights. Chhea further alleges that his conviction, sentence and denial of his appellate rights are a miscarriage of justice, as the Petitioner has never had the merits of his alleged claims address by any Appellate Court, as either the State Courts refuse to turn over to the Petitioner the criminal casfile so that the Defendant could effectively pursue any meaningful appeal and/or the indifferent position the Federal Courts has taken that Chhea is not entitled to equitable tolling, to address those meritful issues discovered only after the state corrective process became final.

THE FEDERAL COURT IMPROPERLY DENIED EQUITABLE TOLLING OF AEDPA ONE-YEAR STATUTE OF LIMITATIONS, WHERE CLEARLY THE PETITIONER WAS NOT AT FAULT FOR THE UNTIMELINESS.

Under 2244(D) the AEDPA provides: a 1-year period of limitation shall apply to an application for Writ of Habeas Corpus by a person in custody pursuant to the judgment of a state court. Only upon extraordinary circumstances would the one-year statute limitations rule be equitably tolled, and under those extraordinary circumstances is it left to the discretion of

the Court. In the instant matter, Chhea believes that he does qualify for equitable tolling where this Court and its Third Circuit, Court of Appeals has accepted three circumstances in which equitable tolling is allowed: (i) When a defendant had actively mislead a petitioner, (ii) when an extraordinary circumstance has stopped a petitioner from asserting his rights, and (iii) when a petitioner has asserted his rights in a timely manner, but in a wrong forum. See **Jones v. Morton**, 195 F.3d 153, 159 (3d. Cir. 1998) (Internal Quotations Omitted).

Herein, Chhea is entitled to equitable tolling due to these extraordinary circumstances where: (A) The absence of Notes of Testimony and Discovery to effectuate any meaningful appeal, due to no fault of the petitioner, but from hinderance by former counsel(s), the Commonwealth and the State Appellate Courts; and (B) The miscarriage of justice that would continue to occur, as the state courts has offer no state corrective process to address the constitutional violations suffered, as the result of state proceedings inadequacy and the federal courts refusal to grant equitable tolling.

In **Holland v. Florida**, 130 S.Ct. 2549 (2010) This Supreme Court stated: "There are no bright lines in determining whether equitable tolling is warranted in a given case." *Id.* at 2563. Instantly, the Petitioner's State Appeal became final when the Superior Court denied Chhea's appeal of the PCRA petition on June 23, 2015. It would not be until May 23, 2016, less than a year later did the Petitioner file his first federal habeas petition in which this Court is addressing the appeal within. In between those two dates above, for the first time and only after state appeals became final did Chhea receive from his former trial counsel the notes of testimony and discovery and only after April 8, 2016.

While June 23, 2015 would be the official date the Petitioner's state appeal became final, Chhea would not receive any of the legal materials needed to effectuate the meaningful state and further federal appeals until after April 8, 2016. Throughout this time frame the AEDPA clock would wind down as Chhea was unable to file any further meaningful appeal due to no fault of his own. The Petitioner believes he is entitled to equitable tolling due to the indifference the Lower Courts, Commonwealth and Former Counsel(s) have shown in denying him access to the Notes of Testimony and Discovery pertinent to effectuating any meaningful criminal appeal.

As far back as October 24, 2011, Chhea would write his former trial attorney expressing his desire to receive a copy of the notes of testimony and discovery (see APPENDIX B: Letters in request for Assistance). The Petitioner didn't stop there, nor with writing only his former trial attorney, Chhea would write to his former PCRA counsel, the Commonwealth, the PCRA/Trial Court (see APPENDIX B), as well filing a motion with the Lower Court on the utmost importance of the notes of testimony and discovery, which Chhea was in dire need of. At no point during any part of the state corrective process did any of the above mentioned parties intervene and provide the Defendant with the reasonably requested legal materials.

Not even after the entire state collateral proceedings became final on June 23, 2015 did any of the above parties provide Chhea with any legal materials to pursue his first federal habeas petition which would have been timely. It would not be until a chain of events that the Disciplinary Board of the Supreme Court of PA, found inappropriate did then former trial counsel provide Chhea with a duplicate copy of the legal materials requested. The inappropriate act to which Chhea speaks of is that the Petitioner in dire need of his legal materials offered to reimburse former trial counsel for

the postage to mail Chhea the notes of testimony and discovery. Former Trial Counsel advised Chhea it would require more funds to duplicate, to which then Chhea forward additional funds to counsel, keeping in mind that the AEDPA clock continues to counting down. Months would go by and no response from former counsel after the forwarding of two checks payable for postage and reproduction of legal materials (see APPENDIX B).

Sometime in between the waiting period, with the AEDPA clock still winding down, Chhea filed a complaint with the Disciplinary Board of PA, expressing the problem and bind in which he was in and how former counsel accepted his funds but did not produce the legal materials he needed (see APPENDIX C). It was then and only then did the former trial counsel then forward the previously requested pertinent legal materials which Chhea was without during state collateral proceedings which became final on June 23, 2015, but only finally received after April 8, 2016 (see APPENDIX D). Furthermore, however insignificant, former court appointed trial counsel returned the funds back to the Petitioner.

It is this time period of May 23, 2015 (state appeals became final) - April 8, 2016 (receipt of notes of testimony and discovery) that your Petitioner Ricky Bona Chhea, believes should be equitably tolled. The chain of events in between this time frame culminating from the entire state collateral proceedings, where at any point when the Defendant was forced to proceed Pro Se, without the aide of counsel, having clearly invoked the right to appeal, should have been provided with the essential legal materials, namely the notes of testimony and discovery. Instead of learning and perfecting the federal appeal, this time was spent trying to obtain said documents. Without said documents any further appeal would not only not be meaningful, it would be meaningless.

"While confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record." *Martinez v. Ryan*, 132 S.Ct. 1309, 1317 (2012). Herein, the task of this prisoner's dilemma becomes even more difficult where no party involved would provide the defendant any legal materials until almost the 11th hour, where the AEDPA clock has almost wind down. Under 2244(D) the AEDPA provides: a 1-year period of limitation shall apply to an application for Writ of Habeas Corpus by a person in custody pursuant to the judgment of a state court. By these very words the time frame belongs to the individual in custody who seeks to challenge a state court judgment in an application for Writ of Habeas Corpus, any hinderance by any party should be equitable tolled as an extraordinary circumstance, where had not been for the fault of those involved the federal petition would be timely.

The very procedural history of the Petitioner's appeal lends credence as to why the matter should be equitably tolled, as the entire state collateral proceedings were done without Chhea having the very same legal materials. Only for the Petitioner to then be provided those documents a month before he filed for federal habeas corpus. The adverse ruling by the Lower Courts is in direct contradiction to the *Holland* Court's belief that exceptions to the rule could surface of "flexibility, avoiding mechanical rules and awareness that specific circumstances, often hard to predict in advance, did warrant special treatment." *Id.*

While it can be said upon receiving the legal materials on or after April 8, 2016, the Petitioner could have filed a placeholder petition to avoid the untimeliness and violation of AEDPA limitation. However, if an inexperienced unlearned prisoner having already great difficulty in obtaining the legal materials needed to perfect an appeal, could not even do so, how

can any expectation be made that, that individual would know to file a place holder petition to avoid the untimeliness bar. This mode of thinking is in direct contrast to the Holland Court's logic of avoidance of drawing any bright line. 130 S.Ct. at 2563. Furthermore, downplays the diligence of Chhea who would over a six (6) year span, wrote repeatedly to the former trial counsel Richard T. Brown, Esq., PCRA Counsel Lee Mandell, the Commonwealth, the PCRA Court and ultimately the Disciplinary Board to obtain the notes of testimony and discovery (see APPENDICES B-D). The idea of a place holder petition is clear misdirection, to excused the parties involved of their own neglect in denying the Petitioner the pertinent legal materials in which ultimately led to the drafting and perfecting of the federal habeas petition, which could not have been completed prior to the April 8, 2016, as the parties involved refused to turn over said documents.

Moreover, the matters alleged in the federal habeas petition and memorandum of law in support was never addressed on the merits during federal habeas corpus relief and was never presented to the lower state courts at any proceeding, as the legal materials at issue here was not provided to the Petitioner until after state collateral proceedings became final and with less than a month left on the AEDPA clock. Essentially, the lower courts and the Commonwealth waive their right to have the very claims alleged for the first time in the federal petition, and further sees no wrongdoing on their part why the matters alleged could not have been presented any other way. The adverse parties significantly downplays prisoner Chhea's diligence while asking to be rewarded for denying the Petitioner the very materials in their possession.

The Petitioner Ricky Bona Chhea respectfully request this High Court vacate and remand with clear instructions, so that the claims alleged

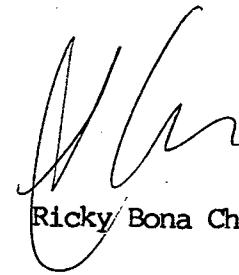
in the federal habeas petition may be addressed on the merits for the first time, as no court, neither state or federal, has given the Petitioner the opportunity to present his claims without hinderance.

Wherefore, the foregoing reasons, Ricky Chhea believes that Certiorari is warranted vacating, the federal court's order and remand of this matter for further proceedings, in which the Petitioner would be afforded the opportunity to have his federal habeas petition addressed on the merits and from that thorough determination, decided if, Petitioner Ricky Bona Chhea is incarcerated in violation of the U.S. Constitution.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Ricky Bona Chhea".

Ricky Bona Chhea, Pro Se

Date: 7-17-18