

AB

Nelson Cobas #186571
G. Robert Cotton Correctional Facility
3510 N. Elm Road
Jackson, Michigan 49201

FILED

APR 26 2019

OFFICE OF THE CLERK
SUPREME COURT, U.S.

Clerk,

Supreme Court of The United States
Washington, D.C. 20543-0001

April 25, 2019

RECEIVED

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

Re: Nelson Cobas v Kevin Lindsey Warden

Dear Clerk: No. 18-7513

Please, find enclosed for filing in your Court an original copy of Motion For Rehearing and Proof of Service. I served also a copy of same upon the Attorney General Office. Thank you for your time in this matter.

Submitted by,

Dated: April 25, 2019

Nelson Cobas #186571

Proof of Service

Petitioner under penalty of perjury declares that on April 25, 2019 served an original copy of Motion For Rehearing, Court Order, and Proof of Service by the MDOC Legal Mail process pursuant to 28 USCS § 1746 including Certificate of Verification upon: Clerk,

Dana Nessel

Supreme Court of the United States

P.O. Box 30217

Washington D.C. 20543-0001

Lansing, Michigan 48909

C.C. File: Att. Gen. Office

Submitted by,

Nelson Cobas #186571

In Pro Se

In The
Supreme Court of The United States

Nelson Cobas - Petitioner

VS

Kevin Lindsey - Respondent Librdem

Certificate of Verification

Now Comes Nelson Cobas, Petitioner herein and submits pursuant to Rule 44 of this Court that the foregoing Petition For Rehearing is presented in good faith and not as a mechanism for delay; That the Claim presented is substantial in that it relates to the failure of the State lower court to adequately and sufficiently consider that petitioner was denied his Constitutional right to the effective assistance of Counsel during his trial due to the State Court judicial mechanism being defective in its decision-making, and subsequently, further defective on post-Conviction and appellate Considerations. Therefore such defects and rulings are not Corrected.

"Exhaustion of Remedies" is an important doctrine in habeas law, Comity, and serve Justice to the Case.

For the reason stated, Cobas avers, under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief. Submitted by

Nelson Cobas #186571

Dated: April 25, 2019

In The
Supreme Court of The United States

Nelson Cobas - Petitioner

VS

Kevin Lindsey - Respondent Warden

Motion For Rehearing

On March 25, 2019 this Court denied Writ of Certiorari. See Copy attached. Petitioner appealed. On April 15, 2019 the Court returned the motion for failure to comply with Rule 44 of this Court. Petitioner now resubmit in corrected form and asks Remand his Case for the following reasons:

Petitioner submits hereby the distinction between "State Procedural Bars" and "Exhaustion Remedies" for the Court to review unexhausted (Appellate Counsel) claim.

1. Because Cobas's application properly filed on April 10, 1997 within the meaning of 28 USC § 2244(d)(2) contains some claims procedurally barred and some claims that are not, and the state procedural bars at issue Mich. Ct. Rules 6.508(D) simply prescribe a rule of decision for a Court Confronted with Claims that were "previously determined on the merits upon an appeal from the Judgment of Conviction or that could have been raised on direct appeal but were not: The Court must deny such claims

for relief". Therefore unless this Court remand petitioner to present his claim to a state court in a petition for discretionary review in order to satisfy the "Exhaustion Requirement" under these provisions will not be successful. *Artuz v Bennett*, 531 US 4, 121 S. CT. 361, 148 L Ed 2d 213 (2000) (Since the 1997 motion was still pending under 2244(d)(2), properly filed and recognized under state law); *O'Sullivan v Boerckel*, 526 US 838, 839-840, 144 L Ed 2d 1. 119 S. CT. 1728 (1999).

State Procedural Bars

2. In this case at bar because claims that are procedurally barred under MCR 6.508(D) must be denied relief, and precluded determination on the merits, unless petitioner demonstrate "good cause" and "actual prejudice" relief will not be granted. MCR 6.508(D)(3) provides in part:

The Court may not grant relief to the defendant if the motion

(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrate

(a) "good cause" for failure to raise such grounds on appeal or in a prior motion, and

(b) "actual prejudice" from the alleged irregularities that support the claim for relief.

The United States District Court decision also is based on April 10, 1997 motion for relief from judgment which denied petitioner petition for a writ of habeas corpus as "untimely filed" under the Antiterrorism and Effective Death Penalty Act (AEDPA) enacted on April 24, 1996, also affirmed by the United States Court of Appeals for the Sixth Circuit. See both Courts Order. 28 USC § 22-44 (d)(1) is distinguished from unexhausted claims.

Exhaustion Requirements

3. MCR 6.500 subchapter exclusive procedure Cobas raised Appellate Counsel claim v: "Constitutional Defects and Rulings Made Outside of Mandatory Standards and Guidelines. And Because The Failure of Both Lower Court Attorney and Appellate Counsel To Raise The Questions of Defects, Defendant was Denied Effective Counsel Thereby Not Affording Defendant A Fair And Impartial Trial." (this issue was never adjudicated by the Court).

This motion was denied on Sept. 15, 1997 under MCR 6.508(D) procedural bars rule. Cobas did not appeal the motion, but sought habeas relief in the Michigan district Court on October 3, 2000. I.d. in the record. Therefore the federal Courts could not review petitioner's "unexhausted claim" because was not addressed, nor waived by the State Courts. See order attached. Even if a timely habeas could have been filed the claim is still unexhausted" because 28 USC § 2254 (B)(3)-(C) provides that:

(3) A State shall not be deemed to have waived the exhaustion requirement or be stopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(C) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(Emphasis Added).

Also, 28 USC sect. 2254 (b)(1)-(A) provides that:

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that-

(A) the applicant has exhausted the remedies available in the courts of the State; ...

XXXXX

As a textual matter, Cobas raised under state procedural laws the grounds presented now in this Court. Petitioner could not obtain relief in federal court without first exhausting state remedies. *O'Sullivan v Baerckel*, *supra* (must give state courts an opportunity to act on such claims before those claims be presented to a federal courts).

If a petitioner presents claims in federal court that have not yet been exhausted, a federal court generally must dismiss the petition. *Boeb v Lundy*, 455 US 509,

510, 102 S. Ct. 1198, 71 LEd2d 379 (1982); See Duncan v Walker, 533 US 167, 178-79, 121 S. Ct. 2120, 150 LEd2d 251 (2001) (The exhaustion requirement of sect. 2254(b) ensures that the state courts have the opportunity fully to consider federal challenges to a custodial judgment before the lower federal courts may entertain a collateral attack upon a judgment).

4. Petitioner "independent claim" is inapplicable to the state procedural bars rule 6.508(D) because ineffective assistance of appellate counsel claims by necessity could not have been raised in an earlier proceeding. Guilmette v Howes, 624 F.3d 286 (6th Cir. 2010); MCR 6.508(D)(3). Id. The trial judge did not enforce a procedural bar to Cobas independent claim, nor reached the merits, or waived it. See order attached. But denied the four (4) other issues.

5. Petitioner believe that because his 1997 motion was properly filed for purpose of S 2244(d)(2) which provides that ("The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim" is pending shall not be counted toward any period of limitations under this subsection) his unexhausted claim is still pending as a matter of habeas corpus proceeding, and should be remanded to the trial Court for further proceeding pending until his claim be exhausted in the State Courts. 2254(b)(1)-(C). Id. (to satisfy the exhaustion requirement in a procedural proper manner).

6. Acknowledging the distinction presented between state procedural bars and unexhausted claims this Court shall conclude that petitioner's claim is not subject to the procedural bars, or limitation period one year grace applicable to habeas petitions under the AEDPA statute of limitations 2244(d)(1) and demand for further proceedings.

In Artuz, the Court held: Only individual claims, and not the application containing those claims, can be procedurally defaulted under state law pursuant to our holdings in Coleman v Thompson, 501 US 722, 115 L Ed 2d 640 111 S. Ct. 2546 (1991), and Wainwright v Sykes, 433 US 72, 53 L Ed 2d 594, 97 S. Ct. 2497 (1977). and compared 2244(b)(1) with 2244(b)(3)(A) in reviewing defaulted claims.

7. Petitioner contends that both attorneys representation constitutes "unreasonable performance", and denied him a fair and impartial trial and due process of law under both State and Federal Constitutions. Mich. Const. 1963, Art. 1 § 20; U.S. Const. Ams. 6, and 14, and Strickland v Washington, 466 US 668, 694, 104 S. Ct. 2052; 80 L Ed 2d 674 (1984); Evitt v Ducey, 469 US 387, 396, 105 S. Ct. 830, 83 L Ed 2d 821 (1985). See United States v Cronic, 466 US 648, 658; 104 S. Ct. 2039; 80 L Ed 2d 657 (1984). Had petitioner not raised appellate Counsel claim in his 1997 motion, it would have been time barred under state law. MCR 6.508(D) (failure to raised on time).

Appellate Counsel Paul Stoychoff raised in his appellate Brief only one issue (illegal impoundment) devoid of merit, because the trial Judge had ruled on a pre-trial

hearing that the "defendant's vehicle is not involved with the murder trial, or investigation". H.T. pages 46-49, 51-53. Therefore petitioner had not an Appeal by Right or Effective Assistance of Counsels at trial or direct appeal, and was deprived of Due Process and Equal Protection of the Law. Id. at VI, and XIV. Ams. Unless this claim be exhausted in state Courts petitioner is unable to show Counsel ineffectiveness, or any other right he may have. Id. at 2254 (b)(1)-(A) exhaustion requirements.

8. In this case at bar, denial of habeas relief as untimely filed is effectively distinguished from unexhausted claims dismissed without prejudice in habeas Court's proceedings, and failure of a federal Court to consider such claims will constitute a miscarriage of justice. Id.

Petitioner believe this Court recognizes the distinction between Cabas unexhausted claim and State dismissal with prejudice of habeas petition under 2244(d)(1) and it will Grant Relief Requested.

Relief Requested

For these reason, petitioner respectfully request this Court to Remand this Case in a petition for discretionary review to exhaust his pending Sixth Amendment claim to the State trial Court for further proceeding.

Dated: April 25, 2019
C.C. File

Att. Gen. Office

Submitted by,
7 Nelson Cabas #186571

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

March 25, 2019

Mr. Nelson Cobas
Prisoner ID # 186571
G. Robert Cotton Corr. Fac.
3510 N. Elm Road
Jackson, MI 49201

Re: Nelson Cobas
v. Kevin Lindsey, Warden
No. 18-7513

Dear Mr. Cobas:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,



Scott S. Harris, Clerk