

18-8655
No. 18-2332

Supreme Court, U.S.
FILED

NOV 20 2018

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

NICHOLAS RYAN HOLLOWAY

PETITIONER

VS.

WENDY KELLY, DIRECTOR
ARKANSAS DEPT. OF CORRECTION

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE
EIGHTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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NO PHONE NUMBER

ORIGINAL

QUESTIONS PRESENTED

Mr. Holloway alleges that his post-conviction counsel's ineffectiveness prejudiced the defense when he failed to seek suppression of incriminating evidence seized from Mr. Holloway's cellphone, and counsel misinformed with regard to the effect of his guilty plea by giving misinformed information as to the time to be served.

Also his post-conviction appellate attorney abandoned the ineffective assistance of trial counsel claims. As a result Mr. Holloway suffered prejudice. In finding no prejudice as required under the Strickland ineffective assistance standard, the Eighth Circuit relied upon the district court's statement of facts, but significantly misstated the slanted version of the facts. This case thus presents the following questions:

Did the U.S. District Court err in deferring to the Arkansas State Courts finding that Mr. Holloway was not prejudiced by both his trial appellate counsel's failure to pursue the affirmative defense guaranteed by the Sixth Amendment to the U.S. Constitution.

LIST OF PARTIES

☒ All parties appear in the caption on the cover page. A list of all parties to the proceeding in this Court whose judgment is subject of this petition is as follows:

Nicholas Ryan Holloway;

Wendy Kelley, Director,
Arkansas Department of Correction.

☐ All parties do not appear in the caption of the cover page.

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**PETITION FOR WRIT OF CERTIORARI TO
THE EIGHTH CIRCUIT COURT OF APPEALS**

The Petitioner, Nicholas Ryan Holloway, respectfully prays a writ of certiorari issue to review the judgment and opinion of the Eighth Circuit Court of Appeals, rendered in these proceedings on September 28, 2018.

OPINION BELOW

- The Eighth Circuit Court of Appeals denied Petitioner’s appeal in it’s Case No. 18-2532.
- The opinion is published, and is reprinted in Appendix A of this petition.
- The order and opinion of the District Court is reprinted in Appendix A to this petition at page 3A, *infra*.

JURISDICTION

The judgment of denial of the Eighth Circuit Court of Appeals in Appendix A to this petition at page 1A and was entered September 28, 2018. A motion for rehearing was never filed.

The jurisdiction of this Court is invoked under 28 USC 1254.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The following Statutory and Constitutional provisions are involved in the case.

U.S. Const. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations, to be confronted with witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. Amend XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law

28 U.S.C. Section 2254.

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

STATEMENT OF CASE

Mr. Holloway and Jeremy Davis were charged in Lonoke County Arkansas Circuit Court with murder 1st degree on or about March 13, 2013. Mr. Holloway was also charged with tampering with physical evidence.

Before charges were filed against Mr. Holloway, his cell phone and other physical evidence was taken from him without his permission or a search warrant. Mr. Holloway also has a learning disability, and historically a low level of intellectual functioning.

Mr. Holloway retained counsel, Claiborne Ferguson, to represent and advise him throughout the proceedings, and at his trial. No pre-trial motions were filed on his behalf. Mr. Holloway maintained his plea of innocent until he was confronted with text messages and other information that had been taken from his cellular telephone and provided to his trial counsel. Based on advice of counsel, Mr. Holloway was convinced to accept an offer of 35 years in the Arkansas Department of Correction.

On July 31, 2014 Mr. Holloway filed his petition for post-conviction relief. Claiming ineffective assistance of counsel. A hearing was held on the post-conviction petition. The Circuit Court entered its order denying Mr. Holloway's petition for post-conviction relief on December 16, 2014.

On January 12, 2015 Mr. Holloway filed his notice of appeal. A motion for extension of time to file the transcript on appeal. However, despite these extensions Holloway failed to timely file the transcript.

Mr. Holloway filed a pro-se petition for writ of error coram nobis in the Circuit Court on December 2, 2015. On December 22, 2015, the State filed its response denying the claims.

On February 10, 2016, the Circuit entered an order denying and dismissing the writ. ON March 9, 2016, Holloway filed a second petition for writ of error coram nobis, claiming the same grounds as the first writ.

On March 24, 2016 the Circuit again entered an order denying and dismissing his March 9, 2016 second petition of error coram nobis.

An appeal followed which was denied in an opinion delivered October 5, 2017. Holloway v. State, (CR-16-432) [2017 WL-4415963].

In 2017, Mr. Holloway filed a Federal writ of habeas corpus, raising six claims for relief. On May 1, 2018, Mr. Holloway was notified that Respondent Wendy Kelley contends Claims 2, 3, and 4 are procedurally barred due to Holloway's failure to adequately pursue these claims in state court. Mr. Holloway's attorney was given an opportunity to and did address this contention by filing a pleading on or about June 1, 2018.

On June 13, 2018, the District Court recommended that the habeas writ be dismissed along with the certificate of appealability be denied. Mr. Holloway did not appeal to the Eighth Circuit Court of Appeals. Mr. Holloway now seeks review from this Court on certiorari.

REASON FOR GRANTING THE WRIT

In this case, the principle-agent relationship is severed and the attorney's act or omissions "cannot fairly be attributed to Mr. Holloway. **Id.** Nor can Mr. Holloway be faulted for failing to act on his own behalf when he lacks reason to believe his attorney's of record, in fact, did not represent him effectively. **Holland v. Florida**, 560 U.S. 130, S.Ct. 2549, 177 L.Ed.2d 130 (2012), is instructive.

There, the Court found that a procedural default, and an attorney's unprofessional conduct may sometimes be an "extraordinary circumstance" justifying relief. The Court also recognized that an attorney's negligence does not provide a basis for tolling a statutory time. However, Mr. Holloway claims that he was abandoned by his attorney, and if true, "would suffice to establish extraordinary circumstances beyond his control." From the time after Mr. Holloway's initial Rule 37 petition until well after time ran-out for appealing the trial court's order of that petition, Mr. Holloway had no counsel.

Mr. Holloway, in reality, had tried during the 90 day appeal period, he had no reason to suspect that he had been reduced to pro se status.

The sole question this Court should take up for review is whether, on the extraordinary fact of Mr. Holloway's case, is there "cause" to excuse any defaulted claims.

Mr. Holloway maintains that there is, for attorney's he believed to be vigilantly representing him had abandoned his claims on appeal without leave of the court without informing him of any actions, taken in relations to withdrawing as representative on appeal.

The United States Supreme Court, agreed that under agency principles, a client cannot be charged with the acts or omissions of an attorney who has abandoned him. Nor can a client be faulted for failing to act on his own behalf when he lacks reason to believe the attorney of

record is not representing him effectively. Also, in the alternative that his default should be excused because his right to due process was violated when the Circuit Court Clerk failed to take action when a notice of appeal of the circuit court's dismissal order. See Jones v. Flowers, 547 U.S. 220 (2006), which established that the clerk's office has a duty to do more, then deny the certified record.

In the interest of fairness justifies this Court to excuse Mr. Holloway's procedural default whenever a procedural default is caused by his attorney. That is simply not the law, and cannot be, if the States are to have an orderly system of criminal litigation conducted by effective representation, then counsel has to be effective in both state court and post-conviction proceedings. See Martinez v. Ryan, 132 S.Ct. 1309 (2012). This constitutes an objective factor external to the defense "which is cause for a procedural default. This situation arose, however, when his post-conviction attorney abandoned him without notice, and thereby occasioned the default.

Also, a host of other factors led to Mr. Holloway's criminal conduct and served to lessen his culpability regardless of the crime committed. Mr. Holloway contends that such an evaluation should have occurred before a decision can be ignored by the U.S. Supreme Court's judiciary. Garrett v. Faubus, 230 U.S. 445 (1959).

Mr. Holloway is not suggesting that the mitigating factors at issue absolve him of all wrong doing, but merely that, under the logic of McQuiggins v. Perkins, 133 S.Ct. 1924 (2013) decision, that such should result in a sentence below that received by similarly situated offenders who do not possess such unfortunate factors serving to lessen culpability. Accordingly, based upon Mr. Holloway's lessened culpability, the sentence which failed to account for such mitigating factors represents a violation of the Eighth Amendment

prohibition against cruel and unusual punishment. As a result, Mr. Holloway need not show that he would prevail on the merits but must demonstrate that the issues are debatable. That this Court could resolve the claims (in a different manner) or that the questions are adequate to deserve encouragement to proceed further. See **Flieger v. Oelo**, 16 F.3d 878, 883 (8th Cir. 1994).

This Court does not require Mr. Holloway to prove that some jurist would grant the writ of certiorari. Indeed, a claim can be debatable even though every jurist of reason might agree, after Mr. Holloway has been granted his writ and the case has received full consideration, that Mr. Holloway will not prevail.

Therefore, doubts as to whether to issue a writ of certiorari should be resolved in favor of Mr. Holloway. **Fuller v. Johnson**, 114 F.3d 491 (5th Cir. 1991).

In its order denying relief, this court also denied a Certificate of Appealability, but indicated that a later application by petitioner would be reviewed de novo. The

court's order denying relief in this matter reorganized the grounds or relief in the petition.

The grounds are discussed below in the order of the court's order denying relief.

1. Mr. Holloway as prejudiced when his Attorney abandoned his Rule 37 appeal.

This court noted that the Arkansas Supreme Court found that his Rule 37 counsel had abandoned the claims of ineffective assistance of counsel raised in the Rule 37 petition because he failed to make arguments supporting his claims in the appellate briefs. Mr. Holloway raises cause upon the negligence of his Rule 37 attorney and prejudice in abandoning his ineffective assistance of trial counsel claims on appeal.

In this Circuit concerning the standard of habeas corpus review when, as here, an issue is reviewed by the state court for plain error. **Hornbuckle v. Groose**, 106 F.3d 253, 257 (8th

Cir.), Cert. denied, 118 S.Ct. 189 (1997). This Court then selected a “highly deferential” standard of review that of **James v. Bowersox**, 187 F. 3d. 866, 869 (8th Cir. 1999). In so holding, the Court overlooked, Mr. Holloway’s contention that he had not demonstrated legal “cause” to preserve error by asserting, both in the state court and in federal court, that failure to preserve error was ineffective assistance of counsel. See **Coleman v. Thompson**, 501 U.S. 722, 754 (1991); **Murray v. Carrier**, 477 U.S. 478, 488 (1986); **Edwards v. Carpenter**, 529 U.S. 446, 450-454 (2000).

2. Mr. Holloway was prejudiced by his Rule 37 attorney when he raised three claims of ineffective assistance of trial counsel without merit.

Mr. Holloway, represent by counsel, filed a Rule 37 petition which cited **Strickland v. Washington**, 466 U.S. 668 (1984), as the case which set the standard for assessing effective assistance counsel.

As previously described, the trial court’s Rule 37 ruling was not ultimately considered and affirmed on appeal. The Arkansas Supreme Court found that counsel abandoned his claims of ineffective assistance of trial counsel.

Mr. Holloway’s allegations of ineffective of counsel was considered and adjudicated in state court, only by the trial court.

Mr. Holloway claims that this court’s decision was an unreasonable determination of clearly established federal law, as determined by the U.S. Supreme Court.

In the previous ground the court selected a “deferential” standard of review by setting aside these issue of procedural default. This court again overlooked Mr. Holloway’s showing of legal “cause” namely, ineffective assistance of counsel.

As discussed above reasonable jurists could disagree on the standard of review used by the court. Even assuming trial counsel’s decision not raised or argued claims that were

without merit, Mr. Holloway still was denied his constitutional right to effective assistance, which triggered a reasonable probability that the Rule 37 proceeding would have been different.

Cause To Excuse Procedural Default

The doctrine barring procedurally defaulted claims is not without exception.

A prisoner can obtain review of a defaulted claim by showing cause for the default and prejudice. **Coleman v. Thompson**, 501 U.S. 722, 750 (1991).

Cause is established when “some objective factor external to the defense impede[s]... efforts to comply with the state’s procedural rule.” **Murray v. Carrier**, 477 U.S. 48, 488, 106 S.Ct. 2639 (1986).

Here, there was an external factor preventing Mr. Holloway from raising claims 2, 3, and 4. Mr. Holloway could have successfully pursued other theories of ineffective assistance of counsel in his Rule 37 petition and on appeal.

In **Coleman**, the U.S. Supreme Court held that as a general Rule “negligence on the part of a prisoner’s post conviction attorney does not qualify as “cause” to excuse procedural default. **Martinez**, 132 S.Ct. at 1316 (quoting **Maples v. Thomas**, 565 U.S. 132 S.Ct 912, 922 (2012)).

The *Martinez* court held that “inadequate assistance of counsel in initial-review collateral proceedings may establish cause for a prisoner’s procedural default of a claim of ineffective assistance at trial. Mr. Holloway has made three substantial claims of ineffective assistance of counsel in his habeas petition, that has demonstrated claims of merit.

Jurists of reason could disagree with this court’s conclusion. It is debatable among jurists whether the fact that Mr. Holloway would have tilted the scale of justice in his favor, and

should be entitled to certiorari on these grounds because he has made a substantial showing of the denial of his right to effective assistance of counsel and is adequate to deserve encouragement to proceed further.

THEREFORE, this Court should issue a writ of ceritorari.

CONCLUSION

For the reasons stated, Mr. Holloway prays this Court issue an order on each of the grounds set forth in the writ. He further prays for any other and further relief which this Court may deem just and proper under the circumstances.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Nicholas R. Holloway", is written over a horizontal line.

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