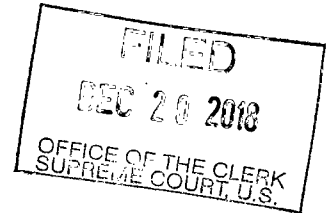


ORIGINAL

No. 18-8984



IN THE
SUPREME COURT OF THE UNITED STATES

NATHAN CAETANO — PETITIONER
(Your Name)

vs.

S. Peery — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Ninth Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Nathan Caetano #A10002
(Your Name)

P.O. Box 5104
(Address)

Delano, CA 93216
(City, State, Zip Code)

(Phone Number)

QUESTIONS PRESENTED

QUESTION #1

- Is AEDPA(1)(B) and its determination actually a retrospective competency determination where mental incompetence is the impediment?

QUESTION #2

- Does AEDPA(1)(B)'s wording "created by State action" allow the petitioner to prove a late violation occurred (structural error) as written under the law to prove the impediment exists (mental incompetence) instead of having to prove the impediment exists going backwards in time through the pursuit of medical records?

QUESTION #3

- Does Moran v. Godinez, 57 F.3d 690 precedent governing "retrospective competency determinations" also apply to retrospective IMPEDIMENT determinations within AEDPA(1)(B) and the Ninth Circuit's two-part test in Bills v. Clark, thus placing the burden on the prosecution where Petitioner can prove the State action by a fact?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ 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:

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is 2018 U.S. Dist. LEXIS 14134

☒ reported at Case No. 1:15-cv-00832-LJO-MJS (HL); or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was September 25, 2018.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. Question #1

Petitioner Caetano argues that AEDPA(1)(B)'s impediment of mental incompetence after a proven state violation (the State Action) becomes a retrospective competency determination.

II. Question #2

Petitioner Caetano argues that there are three parts to AEDPA(1)(B) and the first area of inquiry is "created by state action". In proving the State Action it creates the impediment and affects how the determination of its removal is conducted.

III. Question #3

Petitioner Caetano argues that having proved a structural error of the PC §136B competency hearing and this State Action, Moran v. Godinez 57 F.3d 690 and its governance of retrospective competency determinations is triggered within AEDPA(1)(B)'s equitable tolling. When determining the removal of the impediment the preponderance of the evidence burden is on the attorney general, not the petitioner.

The Constitutional Provisions involved is AEDPA(1)(B)'s equitable tolling exception for an extraordinary circumstance. Petitioner contends he can prove a structural error of the PC §136B competency hearing to prove the impediment of AEDPA(1)(B). It then becomes a retrospective competency determination with the burden on the prosecution to prove when tolling should end.

STATEMENT OF THE CASE

This case is being appealed from a Ninth Circuit ruling denying a COA and upholding of the District Court for the Eastern District of California's Findings and Recommendation. In short they found actual innocence was not proven by the no reasonable juror standard and equitable tolling did not apply for a long enough of a time period to make the petition timely. Thus the petition was found to be time barred.

It is this application for Writ of Certiorari that challenges the burden and standard used in the District Courts equitable tolling determination. AEDPA(1)(B) specifically states an impediment created by state action. Petitioner Caetano here asserts that He can show a structural error under Arizona v. Fulminante of the original PC §1368 competency hearing thus creating the impediment of incompetency (recognized as an extraordinary circumstance) and triggering Moran v. Godinez as the standard to determine retrospective competency. The burden is thus then on the prosecution to prove when tolling is to cease. Arizona v. Fulminante and Moran v. Godinez taken in conjunction are burden shifting even within AEDPA(1)(B).

STATEMENT OF THE CASE

This case is an application for Certiorari appealing the 9th Circuits denial of a Certificate of Appealability upholding the Eastern District of California's decision to deny a COA and its Findings and Recommendation that the habeas petition should be denied as untimely. The Findings were that equitable tolling should not be granted where incompetency was the Impediment. The burden was placed on the petitioner to prove incompetency by a preponderance of the evidence. This petition asks this United States Supreme Court to decide if Petitioner can prove the structural error of the PC §136B competency hearing to prove the impediment exists where upon the competency determination becomes a retrospective competency determination after a Pate violation triggering Moran v. Godínez 57 F.3d 690 with the burden on the prosecution to prove when competency was regained. This regained competency is when equitable tolling should cease not when they should start.

AEDPA imposes a one-year period of limitations on petitioners seeking to file a federal petition for writ of habeas corpus:

- (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgement of a State court. The limitation period shall run from the latest of -
- (B) the date on which the impediment to filing an application created by state action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

QUESTION #1

I am arguing Godínez v. Moran 509 U.S. 389 and its daughter case Moran v. Godínez 57 F.3d 690 is relevant within AEDPA's equitable tolling exception. The equitable tolling determination is a retrospective competency determination by definition. See the word RE-moved? It is past tense. Thus

1 Godínez cannot be ignored.

2 There are three separate predicates in AEDPA (1)(B). First is State
3 action (late violation); second is IMPEDIMENT (incompetence); third is
4 REMOVED (restored competence). Petitioner contends incompetence is actually the
5 merit and is to be considered secondary to STATE ACTION. Petitioner argues he can
6 prove an impediment exists by proving the PC §136B competency hearing was
7 unconstitutional. The first area of inquiry. The STATE ACTION of AEDPA(1)(B).

8 In between the first and second area of inquiry (State Action and impediment)
9 Moran v. Godínez 57 F.3d 690 is triggered. By proving the State Action it creates
10 the impediment leaving only to determine when three occurs. When the impediment
11 is REMOVED. Petitioner's argument is IF AEDPA(1)(B)'s impediment is a
12 retrospective competency determination then Moran v. Godínez 57 F.3d 690 has to be
13 the governing United States Supreme Court clearly established law. Godínez and Moran
14 is then relevant within AEDPA's equitable tolling determination.

15 16 QUESTION #2

17 - Does AEDPA(1)(B)'s wording "created by state action" allow the Petitioner
18 to prove a late violation occurred (structural error) as written under the law to
19 prove the impediment exists (mental incompetence) instead of having to prove the
20 impediment exists going back in time through the pursuit of medical records.

21
22 It is obvious it depends on state action or the impediment wouldn't qualify.
23 The state action is the predicate. The Petitioner was only incompetent after the
24 conviction and the filing late because of the state's Action on 1/13/10. If the
25 State would not have held a fundamentally unconstitutional PC §136B competency
26 hearing the petitioner never would have been convicted and the petition would not have
27 been late. It is original sin. The conviction is fruit from the tree of poison. By
28 proving the original sin, the state action, it CREATES the impediment. There are

multiple ways to prove a state violation occurred thus there are multiple ways to prove an impediment exists. Petitioner can prove the extraordinary circumstance by proving the state action.

The conviction of a legally incompetent defendant violates the Due Process Clause of the Fourteenth Amendment. Copper v. Oklahoma, 517 US 348.

United States Constitution - Amendment Five = "No person shall be ... deprived of life, liberty, or property, without due process of law...".

United States Constitution - Fourteenth Amendment - Section 1. "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 laws."

Pate v. Robinson, 383 US 375 (1966) (Having determined that Robinson's constitutional rights were abridged by his failure to receive an adequate hearing on his competence to stand trial, we direct that the writ of habeas corpus must issue and Robinson be discharged, unless the state gives him a new trial within a reasonable time.)

Here in this instant petition California law states where sua sponte competency proceedings are instituted, defense counsel is to be inquired of if he is or is not wanting a finding of incompetence. California PC §1368 (a). If he is not then two doctors have to examine defendant. This occurred and only one doctor examined Petitioner. A state violation by a fact of written law, California Rules of Court 4.130 states any expert appointed must examine defendant. Here two experts were appointed and only one examined defendant. A second Pate violation.

This proves the state action (a structural error in the §1368 hearing) and brings with it presumed incompetence. To look to the evaluation reports and the new evidence is actually to determine when the IMPEDIMENT is removed. By the facts of the above paragraph petitioner has proved state action and impediment. It is Petitioner's argument that this unique structural error and miscarriage of justice shifts the burden

1 to the prosecution to prove when the impediment (incompetence) has ended even within
2 AEDPA's equitable tolling determination. The argument is that the district court in
3 using Bills v. Clark and not acknowledging the proven state action placed the burden
4 on the Petitioner to prove retrospective incompetence, the impediment. As already shown
5 this was done by proving the structural error. The Petitioner actually did prove state action.
6 In its proving it proved the impediment until it is removed by a preponderance of the
7 evidence. This is where Petitioner argues Moran v. Godinez governs and shifts the burden. Not
8 that it exists by a preponderance. Petitioner argues it can prove state action by a prepon-
9 derance to create the impediment. Making any doubts decided in favor of Petitioner.

10 This is the argument that Bills v. Clark's 2-part-test and AEDPA's equitable
11 tolling rules conflict with Godinez v. Moran 509 US 389 and Moran v. Godinez 57 F.3d 690.
12 Mind this Court it is only PROVEN State Action of fundamentally unconstitutional §1368
13 hearings. We are not arguing opinions or new evidence at this juncture. It has to do with a
14 structural error of the §1368 hearing itself. A very rare occurrence in a late petition. By
15 proving a structural error of the trial mechanism of the §1368 hearing itself it creates
16 the impediment.

17 It is the argument the structural error of the §1368 hearing is to be considered
18 first (State Action) before the conclusion of the evidence. Conclusion of the evidence would
19 be the removal of the impediment. It is the argument the district court in using Bills
20 decided the conclusion though ignored its first area of inquiry, the State action. The state
21 action being proved creates the impediment triggering Moran v. Godinez for the retrospective
22 competency determination, i.e. the removal of the impediment.

23 Caetano contends it is able to prove the extraordinary circumstance from the
24 front end of the tolling period instead of the back end. AEDPA (1)(B) states "the date
25 on which the IMPEDIMENT to filing an application CREATED BY STATE ACTION in
26 violation of the Constitution or laws of the United States is REMOVED."

27 The late violation shown to have occurred by the written letter of the law proves
28 it was a state action and in violation of the constitution thus creating the

1 impediment, presumed incompetence. Under Moran v. Godinez to be in effect until such
2 time the prosecution proves it ended.

3 This is the crux of Petitioners argument. That He need not show incompetence
4 moving backwards in time. That AEDPA(1)(B) specifically asks to prove the state action
5 that created the impediment. Thus He can show the miscarriage of justice of the \$1368
6 hearing at which time Godinez and Moran are triggered. To do otherwise would be "an
7 unreasonable application of United States Supreme Court law."

8 This is the argument of how and why Moran v. Godinez 57 F.3d 690 is relevant
9 within AEDPA(1)(B)'s equitable tolling determination. See Holland v. Florida 560 US 631
10 (A habeas petitioner is entitled to equitable tolling of the one-year statute of limit-
11 ations only if he shows: (1) that he has been pursuing his rights diligently; and (2)
12 that some extraordinary circumstance stood in his way and prevented timely filing).
13 An evidentiary hearing should have been held using Moran v. Godinez to determine when
14 the impediment was removed.

15 16 QUESTION #3

17 - Does Moran v. Godinez 57 F.3d 690 precedent governing "retrospective
18 competency determinations" also apply to retrospective IMPEDIMENT determina-
19 tions within AEDPA(1)(B) and the Ninth Circuits two-part test in Bills v. Clark; thus
20 placing the burden on the prosecution when petitioner can prove the state action by a
21 fact?

22
23 Bills v. Clark, 628 F.3d 1092 (9th Cir. Cal. 2010) two-part test:

- 24 (1) First, a petitioner must show his mental impairment was an "extra-
25 ordinary circumstance" beyond his control, by demonstrating the im-
26 pairment was so severe that either
27 (a) petitioner was unable to rationally or factually to personally understand
28 the need to timely file, or

(b) petitioners mental state rendered him unable personally to prepare a habeas petition and effectuate its filing.

(2) Second, the petitioner must show diligence in pursuing the claims to the extent he could understand them, but that the mental impairment made it impossible to meet the filing deadline under the totality of the circumstances, including reasonably available access to assistance.

Bills v. Clark and AEDPA(1)(B) both conflict with Godinez v. Moran, 509 US 389 and Moran v. Godinez 57 F.3d 690. The fact there was a structurally deficient PC §136B hearing and an incompetent plea the Petitioner contends proving the late violation actually satisfies Bills first part. Triggering Moran and shifting the burden. Moran v. Godinez 57 F.3d 690 (Further, the post-conviction court violated state law when it placed the burden of proving competency on appellant...). Godinez v. Moran was/is clearly established Federal United States Supreme Court law governing the ability to plead guilty and retrospective competency determinations. Godinez was decided in 1993, preceeding AEDPA by three years. Moran in 1994. AEDPA unduly places the burden on the prejudiced party who suffered the original miscarriage of justice. It makes no sense to make the petitioner bear the burden first then when it comes to the merit to have the prosecution bear the burden that has already been borne. It makes Moran v. Godinez superfluous. Yes the petition is late and the consequence is that the petitioner has to show an impediment by a preponderance of the evidence. Petitioner argues this can be accomplished two ways. By showing incompetence with medical records that Bills v. Clark normally uses. This is arguing matters of opinion and is not factual. The second, Petitioner argues here by PROVING the State action (a late violation occurred creating presumed incompetence under the law) whereupon it creates the impediment and triggers Moran v. Godinez 57 F.3d 690.

The State action (Structural error) is not actually the merit. AEDPA(1)(B) specifically asks for it as a predicate. The competency determination is the merit.

1 Incompetence, the impediment, is actually created when the state action is proved.

2 Here a Fundamental miscarriage of justice.

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REASONS FOR GRANTING THE WRIT

Moran v. Godinez, 57 F.3d 690 clearly states a retrospective competency determination burden is on the prosecution. The Petitioner, having proved the State action of the unconstitutional PC §1368 hearing (structural error), as written in law creates the impediment (presumed incompetence), satisfying the extraordinary circumstance requirement for equitable tolling. At that moment the district court should have held an evidentiary hearing to determine retrospective competency, given the record and lack thereof. I say record because of the provided medical records of 2009-2011 showing incompetence. I say lack thereof because the record of the PC §1368 hearing is withheld from Caetano and the attorney general did not provide it to the district court. It is unimaginable the district court tried to say the record was amply developed without this PC §1368 record. That record proves the State action (State violation) that creates the impediment and triggers Moran v. Godinez, 57 F.3d 690. Retrospective competency determination with the burden on the prosecution.

Petitioner Caetano contends proving the "State action" of AEDPA(1)(B) creates the "impediment". The impediment is presumed incompetence. This is the consequence of a proven State violation. Incompetence is an extraordinary circumstance. Now it becomes a retrospective competency determination and shifts the burden of the removed impediment to the prosecution.

The reason to grant the writ is because the impediment determination in AEDPA(1)(B) is in fact a retrospective competency determination. Being a retrospective competency determination if the State action is proved by a preponderance of the evidence, it then proves by a preponderance of the evidence the impediment's existence. This having been done, this Supreme Court needs to rule that the burden is then shifted to the prosecution to prove by a preponderance of the evidence when the impediment is removed. This ruling will make Moran v. Godinez, 57 F.3d 690 relevant within AEDPA(1)(B)'s impediment determination.

1 This ruling only governs cases that are late, involve incompetency as the
2 impediment and where the Petitioner can prove by a preponderance of the evidence
3 the structural defect of the inadequate PC §1368 competency hearing.
4 Petitioner still has to prove by a preponderance of the evidence though it is not
5 the impediment itself. He can do it by proving the state action (structural
6 defect) that triggers the impediment's existence. Proving the late violation
7 triggers presumed incompetence. This is allowed because AEDPA(1)(B) states
8 "created by State action". This then becomes a predicate of the impediment.

9 Arizona v. Fulminante, 499 US 279 (Structural error is error that permeates
10 'the entire conduct of the trial from the beginning to the end' or 'affects the frame-
11 work within which the trial proceeds').

12 The State action was a structural error in the §1368 hearing. This error
13 preceded any guilt phase, arraignment, preliminary hearing, plea or conviction. It
14 permeated the whole course of events and is the cause of why the petition was late.
15 This case will protect the rights of a very small class of individuals whose rights were unable to
16 be protected by themselves by definition of the law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

NATHAN CAETANO

Nathaniel D. Caetano auth. agent

Date: 16th December 2018