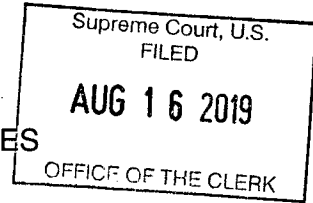


19-5834 ORIGINAL
No. _____

IN THE
SUPREME COURT OF THE UNITED STATES



Thomas David McWaters — PETITIONER
(Your Name)

vs.

Charles L. Ryan, et al. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

Thomas David McWaters, Prison No: 268100
(Your Name)

ASPC-Florence, North Unit, P.O. Box 8000
(Address)

Florence, AL 35132
(City, State, Zip Code)

None
(Phone Number)

QUESTION(S) PRESENTED

No. One: In Petitioner's Request to the Ninth Circuit Court For A Certificate of Appealability, would a jurist of Reason Find it debatable whether he stated a valid "ineffective assistance of counsel claim in his ARIZONA Rule 32 of-right proceedings," CAUSE to present his untimely ineffective assistance of trial counsel claims, Among other claims, to the ARIZONA District Court?

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:

1. CHARLES L. RYAN, Director of the ARIZONA Department of Corrections; and
2. The Attorney General of the State of ARIZONA.

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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 C 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☒ is unpublished.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 A to the petition and is

☐ reported at _____; 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☒ is unpublished.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☐ is unpublished.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 MAY 23, 2019.

☒ 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. Constitution:

The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides that "no State shall... 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 laws."

STATEMENT OF THE CASE

I. State Court Proceedings:

On October 24, 2011, Petitioner pled guilty in the Gila County Superior Court, State of Arizona, to one count of attempted second-degree murder, a dangerous offense. On November 21, 2011, the trial court sentenced Petitioner to an aggravated term of fourteen years imprisonment.

Pursuant to Rule 32.1, A.R.Crim.P., post conviction proceeding of-right (plea of guilty/Appel), Petitioner timely file his Notice of post conviction relief of-right and the court appointed him counsel. Rule 32 counsel advised the court she was unable to find any colorable claims to present in Petitioner's behalf, requested that Petitioner be allowed to proceed pro per, and counsel did not file a factual brief (Anders) for the court to review. The court granted counsel's request and ordered counsel to remain as Petitioner's advisory counsel.

Petitioner a layman at law¹ and without any resources² nor knowledge of a pro-per litigant, communicated with his Rule 32 of-right counsel on several occasions concerning what does he do, yet to no avail. Subsequently, the court dismissed the Rule 32 of-right proceeding and moreover, counsel did not give Petitioner any advise and specifically on any review procedures.

-
1. Petitioner's arrest in the case was his first exposure to the criminal justice and legal system in the 68 years of his life.
 2. The Arizona State Prison closed its law library on or about the year 1997 and implemented Department Order 902, that which does not provide case law, and legal assistance and advise is prohibited.

Petitioner also attempted to hire an attorney Stephen B. Manion to represent him on collateral review whom was paid in full, unfortunately, the attorney stole his money and would not return his case files and court records. Petitioner filed a complaint with the State Bar of Arizona requesting the return of his money payment and legal files, yet, to no avail and disappointment.³

Petitioner untimely notified the State Superior Court of his situation that was no fault of his and the court permitted him to file a second Rule 32 of-right proceeding.⁴ Petitioner presented ineffective trial counsel and ineffective assistance of Rule 32 of-right counsel. The Superior Court denied the petition on the merits of the claims raised.

Petitioner timely filed a petition for review to the Arizona Court of Appeals. The Appellate Court ruled that Petitioner's second Rule 32 of-right was procedurally barred and denied review. Petitioner timely filed a petition for review to the Arizona Supreme Court and in its discretion denied review.

II. United States Supreme Court:

In his Rule 32 of-right proceedings, Petitioner filed for a writ of certiorari of the state proceedings to the United States Supreme Court, No. 16-9291. The question was: "When competency is at issue, was it a violation of the Sixth and Fourteenth Amendments to deny relief without hearings?" In its discretion, the Supreme Court denied certiorari review.

³ Mr. Manion was disbarred for 6 mths and 1 day under Arizona Law.

⁴ Petitioner was assisted by an inmate against prison policy.

III. Federal District Court:

Petitioner timely filed for a writ of habeas corpus by a person in state custody to the United States District Court of Arizona. No. CV-17-03974-PHX-SAL. Petitioner presented four grounds for relief:

1. Trial counsel was ineffective and violated due process as a "signatory" when generating a "fraudulent" written plea agreement;
2. Trial counsel was ineffective and violated due process during plea negotiations, when misleading (erroneous advice & misinformation) the Petitioner into believing he would receive a seven (7) year prison term in consideration for his guilty plea to the state's plea offer;
3. Trial counsel was ineffective when failing to investigate the side-effects and adverse reactions of the mind altering drugs (ARICEPT) that were prescribed and used by the Petitioner for many years (8) prior to and during the incident of arrest; and
4. Rule 32 counsel was ineffective during Petitioner's Rule 32 off-right proceedings, when noticing the court that she reviewed the record and found no errors, did not "brief" the Petitioner's case, and did not advise Petitioner of his right to petition the appellate court.

Petitioner argued that his Rule 32 counsel's deficiency was cause to raise the ineffective trial counsel claims, and that his second Rule 32 was not procedurally barred based upon Arizona's Rule 32.2 (b), exceptions to preclusion.

The District Court held in part that Petitioner's ineffective Rule 32 counsel claim was not cause to entitle statutory or equitable tolling of the "AEDPA's" one-year statute of limitation, and concluded that

the Petition was untimely, and that a certificate of appealability is denied. (See District Court's Decision, Appendix A)

IV. Federal Court of Appeals

Petitioner timely appeal the District Court's decision to the United States Ninth Circuit Court of Appeals (No. 18-17397), and requesting a certificate of appealability for cause, based upon the United States Supreme Court's decision in Martinez v. Ryan, 132 S.Ct. 1309 (2012) that held inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial; and Pacheco v. Ryan, United States District Court for Arizona, No. CV15-02264-PHX-DGC, 2016 WL 7407242 (D. Ariz. Dec. 22, 2016) where the court found ineffective assistance of Rule 32 off-right counselor, when failing to brief the case for the court's review upon counsel's withdrawal from the case and the defendant was required to proceed pro-per; among other debatable citations. (See Motion for Certificate of Appealability, Appendix B)

Two Ninth Circuit Judges ^{held} that Petitioner's request for a certificate of appealability is denied because he has not shown that "jurist of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." See Ninth Circuit Decision, Appendix C.

REASONS FOR GRANTING THE PETITION

In Petitioner's case, the issue is whether the ineffective assistance of his Rule 32 of-Right counsel, on initial/direct review is "cause" to excuse a procedural default for a Certificate of Appealability on his ineffective assistance of trial counsel claims. (See Motion For Certificate of Appealability, Appendix B)

The Supreme Court has "not identified with precision exactly what constitutes 'cause' to excuse a procedural default." Wainwright v. Sykes, 433 U.S. 72, 87 (1977) Subsequently, the Supreme Court in Murray v. Carrier, 477 U.S. 478, 488 (1986), identified that a procedural default as the result of ineffective assistance of counsel, may constitute "cause" to excuse a procedural default.

Moreover, most recently in a similar Arizona case, the Supreme Court in an explicit legal analysis, in Martinez v. Ryan, 132 S. Ct. 1309 (2012), and as the "Supreme Jurist" ordered that its "opinion qualifies Coleman [501 U.S. 722] by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial," at 1316. (See Appendix D, Martinez). The Lower court has misapplied this Court's ruling.

As an illustration, reasonable jurist in the U.S. District Court of Arizona, Pacheco v. Ryan et al., No. CV-15-02264-PHX-DGC (Doc. 26 Order), explicitly analysed a pleading defendant's Rule 32 of-Right proceeding, as in Petitioner's case, where his counsel found no arguments to present to the court, and did not "Brief" the case for an independent review by the court. The District Court ordered that the Rule 32 counsel is required to file a "Brief" consistent with Anders v. California, 386

U.S. 738 (1967), For an independent review of the record by the Arizona superior court in its Rule 32 of-Right proceedings.

The state did not appeal the Pacheco order and as a result, Arizona made substantive changes to its Rule 32 of-Right proceedings, i.e., "the defendant ... may file an of-right notice challenging the effectiveness of Rule 32 counsel in the first of-right proceeding." Rule 32.1, eff. Jan. 1, 2018; and "In an of-right proceeding, if counsel determines there are no colorable claims, counsel must file a notice advising the court of this determination. The notice should include a summary of the facts and procedural history of the case, including appropriate citations to the record. ["BRIEF"] The notice also must identify the specific materials that counsel reviewed." (emphasis added) Rule 32.4 (d), eff. Jan. 1, 2018. The Arizona's substantive rule changes is evident of a reasonable jurist [Arizona Supreme Court/Rule Maker] in debate of the lower court's decisions in Petitioner's case.

In Petitioner's case, his Rule 32 of-Right counsel found no arguments; did not file a factual brief [Anders]; and would not give Petitioner fundamental^{AL} and procedural advice, thus, Rule 32 counsel's actions were below the standards of professional conduct, in violation of Petitioner's Sixth and Fourteenth Amendments constitutional rights, in his Rule 32 of-Right first tier review of ineffective assistance of trial counsel claims, Rule 32 counsel failed to afford adequate representation, therefore, "good cause" necessary to excuse substantial delay in bringing the ineffective trial counsel claim. (Grounds 1, 2 & 3 of Habeas)

Petitioner RAISED Three Grounds of Ineffective Assistance of Trial Counsel in his District Court Habeas Petition, inter alia, eg., counsel unlawfully required the Petitioner to sign the written plea agreement while he was under a court ordered mental examination, and counsel gave Petitioner erroneous advise and misleading information when the court had not officially ordered that Petitioner was competent to understand the proceedings; and without a "Formal Proceeding" during the plea negotiations. (Substantive IAC claims) See: Missouri v. Frye, 132 S.Ct. 1399 (2012).

CONCLUSION

The 9th Circuit's order is in conflict with the Supreme Court's decision in MARTINEZ and District Court's Pacheco order, where "just of reason" would find it debatable. The petition for a writ of certiorari should be granted.

Respectfully submitted,

Thomas David McWaters

Date: 16 AUGUST 2019