

19-6599

Supreme Court, U.S.
FILED

AUG 12 2019

OFFICE OF THE CLERK

No. 18-31193

USDC No. 2:18-CV-4182

IN THE
SUPREME COURT OF THE UNITED STATES

WALTER D. FAIRLEY --- PETITIONER

Vs.

JASON KENT, WARDEN --- RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FIFTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR A WRIT OF CERTIORARI

WALTER D. FAIRLEY # 626719

(Your Name)

P.O. BOX 788 / U-2-D-12

JACKSON, LA 70748-0788
(City, State, Zip Code)

(Phone Number)

19

QUESTION(S) PRESENTED

- 1.) Whether the Magistrate for the U.S. Eastern District Court of Louisiana erred when they issued a Report and Recommendation recommending that the petitioner's petition be dismissed with prejudice as time barred.
- 2.) Whether the U.S. Fifth Circuit Court of Appeal erred when denying petitioner's COA with the reasoning of it being a time barred situation.
- 3.) Whether the principles of comity and finality that inform the concepts of cause and prejudice must yield to the imperative of correcting a fundamentally unjust incarceration.
- 4.) Whether the continued incarceration of the petitioner would be a violation of his Rights to Due Process of Law from the errors committed.

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:

District Attorney, 22nd JDC
Warren L. Montgomery
701 N. Columbia Street
Covington, La. 70433

Warden Jason Kent
Dixon Correctional Institute
P.O. Box 788
Jackson, La. 70748

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APPENDIX B The opinion of the United States Court of Appeals for the Fifth Circuit denying a certificate of Appealability is attached hereto as **Appendix “B”**. Civil Cause No. 18-31193.

APPENDIX C The Order of the United States District Court for the Eastern District of Louisiana denying petitioner a rehearing. Attached hereto as **Appendix “C”**. Civil Cause No. 18-4182.

APPENDIX D The Order of the United States District Court for the Eastern District of Louisiana adopting the Magistrate Judge’s report and recommendation. Attached hereto as **Appendix “D”**. Civil Cause No. 18-4182.

APPENDIX E The report and recommendation of the United States Magistrate Judge for the Eastern District of Louisiana on Petitioner’s Section 2254 petition is attached hereto as **Appendix “E”**. Civil Cause No. 18-4182.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES
FIFTH CIRCUIT COURT OF APPEALS

The petitioner, Walter D. Fairley, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Fifth Circuit Court rendered in these proceedings on **July 3, 2019**.

OPINIONS BELOW

Cases from **federal** courts:

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JURISDICTIONAL STATEMENT

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered on **July 3, 2019**. Petitioner is now requesting the jurisdiction of this Court to be invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

The following statutory and constitutional provisions are involved in this 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 accusation; to be confronted with the 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

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 laws.

28 U.S.C. 2254

Louisiana Constitution Art. I, 16, 17.

PROCEDURAL HISTORY OF THE CASE

In May 2018 petitioner filed his 28 U.S.C. § 2254 for Writ of Habeas Corpus with the Eastern District of Louisiana. On September 10, 2018, the Magistrate Judge for the U.S. Eastern District Court of Louisiana issued a Report and Recommendation recommending that the petitioner's petition be dismissed with prejudice as time barred.

On October 12, 2018 the Judge for the Eastern District of Louisiana adopted the Magistrate's report and recommendation. In October 2018, petitioner filed a reconsideration and/or rehearing from the Eastern District's report and recommendation. On October 29, 2018, the Eastern District of Louisiana denied reconsideration. On November 6, 2018, petitioner filed a Notice of Appeal with the U. S. 5th Circuit Court of Appeal. On November 16, 2018, the 5th Circuit issued petitioner his U. S. 5th Circuit docket number. On November 19, 2018, petitioner filed a COA with the U. S. 5th Circuit Court of Appeals. On July 3, 2019 the U. S. 5th Circuit Court of Appeals denied petitioner's COA.

STATEMENT OF THE CASE

The District Court was in error to dismiss with prejudice for the following reasons.

The timeliness provision in 2255 is subject to equitable tolling." Holland v. Florida, 560 U.S. 631, 634, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010). A petitioner is entitled to equitable tolling if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.

Petitioner argues that Diaz v. Kelly, 515 F.3d 149 (2d Cir. 2008), requires equitable tolling. In *Diaz*, the record established that the inmate inquired to the state

appellate court nine months after he sought leave to appeal and learned that the state appellate court had denied his petition six months earlier. The inmate filed his federal petition one day later, and the Second Circuit found that equitable tolling applied to the inmate's petition even though he filed the petition six months after AEDPA's one-year deadline. *Diaz*, 515 F.3d at 155-56.

Petitioner's conviction was timely appealed by the Louisiana Appellate Project where a decision was rendered by the Louisiana First Circuit of Appeals on March 6, 2015. Within a few days after petitioner received this answer, petitioner wrote his appellate attorney (see exhibit "C") requesting his trial transcripts and for his attorney to file a *motion for extension of time* so he could prepare to go to the Louisiana Supreme Court with his Writ of Certiorari. Petitioner did not get a response back from his appellate attorney until March 28, 2015. (see exhibit "D") It is certainly an extraordinary circumstance when your appellate attorney says he doesn't have your trial transcripts of any pertinent material needed. How are you to prepare? It is blatant disregard and to further add insult to injury the appellate waits to respond and won't file an extension. Through no fault of his own, since petitioner had no way of knowing how to proceed to the next step, petitioner's time to file his Writ of Certiorari with the Louisiana Supreme Court expired on April 6, 2015.

In the Appellate Attorney's letter of response dated March 26, 2015, the attorney says he doesn't "*think*" (emphasis added) that he will be able to request an extension because of his workload. He further leads the petitioner into believing that he can file for an extension himself. It was later learned by petitioner that Louisiana Supreme Court rule in Rule X states: No extension of time therefor will be granted.

The petitioner doesn't know what to do at this point. That's in part due to the fact that the appellate attorney doesn't make it clear whether he will or he won't file the extension. The petitioner did not self induce this notion; the appellate attorney's letter improperly induces him. Time was of the essence at this point, being that the appellate attorney took so long to reply.

Petitioner discovered not only how to file for an extension but, also that the LA. Supreme Court rule clearly indicates there will be no extensions considered in this particular phase. This was devastating and the petitioner asks this Honorable Court what more is needed to measure extraordinary circumstance? A supposedly experienced appellate attorney not only is vague and misleading in a response, but much more, he erroneously advises the petitioner on the whole matter. The proof is here in black and white. The loss of days was about thirty five at this point, so the petitioner pursued his next option, (the PCR), expeditiously.

Petitioner argues that the limitation period should be equitably tolled for this time period as he has proof that his appellate attorney played a significant part in his delinquency of not filing his Writ of Certiorari on time. Waiting to receive a response from this attorney sums up the complete issue as to why Petitioner was not on time. (See attached Appellant Attorney letters)

Thereafter, petitioner knew he had two years to file Application for Post Conviction Relief (PCR) so he began pursuing his trial record while knowing it would practically do no good to file the PCR without it.

On November 2, 2015, petitioner then filed to the district court, by way of *Motion for Production of Trial and Sentencing Transcripts*, to obtain a copy of his trial

transcripts so he could properly prepare his (PCR). Every litigator knows it to be impossible to properly file a PCR without them.

Petitioner was diligently pursuing his trial record this entire time, however, it became obvious in April 2016 that he would probably never get them. Petitioner would also like to note for the court that he had no control of how long it took for the courts to answer his motions for production of his trial record. This court should see no point in obliging a *pro se* litigant to pester a state court with frequent inquiries as to whether a pending motion has been decided.

Petitioner filed his PCR to the district court exactly one month after AEDPA's one-year deadline. Once it became clear that petitioner wasn't going to obtain his transcripts he promptly filed his PCR using only his memory of the trial. Petitioner understands that rules are rules, but is it morally right to deny petitioner a copy of his trial record knowing he will not be able to properly file his PCR without it and then go even farther by requesting this court to deny petitioner's petition due to it being untimely by a mere month? In the past the courts have allowed untimely applications. *See Miller*, 305 F.3d at 496 (five and one-half month interval between limitations period and discovery of state court ruling does not show lack of diligence; *Phillips*, 216 F.3d at 511 (four month interval).

Petitioner has claims that deserve encouragement to proceed further. These claims include where counsel conceded the petitioner's guilt at a critical stage during trial as in McCoy v. Louisiana, 2018 U.S. Lexis 2802, (1-17-18), along with Fruit of Poison Tree Doctrine where *petitioner* was vindictively prosecuted and can demonstrate this as in Bracy v. Gramley, 520 U.S. 899, (1997) and Rippo v. Baker, 137 S. Ct. 905; 197 L. Ed.

2d 167; (2017). These are constitutional claims the U.S. Eastern District for Louisiana have never reviewed.

REASONS FOR GRANTING THE WRIT

The continued incarceration of the petitioner would be a violation of his rights to Due Process of Law as the U.S. Fifth Circuit Court of Appeals and the U.S. Eastern District for the State of Louisiana erred in denying petitioner's 2254 petition as time barred when her sister circuit allowed an inmate petitioner the tolling time of nine months after he sought leave to appeal and learned that the state appellate court had denied his petition six months earlier. Here in petitioner's case he is only requesting approximately 9 days to be tolled. Petitioner was denied his right to Due Process of Law as there was sufficient proof that through no fault of his own, petitioner's appellant attorney is to blame for misleading petitioner as to the proper avenue to proceed. The petitioner was denied his Fourteenth Amendment of the United States Constitution.

The primary focus in this case should be the false representation that petitioner could file an extension. By the time the petitioner gets on the Louisiana Department of Corrections law library docket and learns that Rule 10 of the La. Supreme Court allows no extension it is too late to prepare the Writ. The thirty (30) day statute elapses in part because of the obvious indifference to the petitioner by the Appellate Counsel in (A) not responding in a timely manner to a time sensitive matter, and (B) by the Appellate Counsel giving erroneous advice to the petitioner.

The petitioner was not time-barred for being a year over time limitations, but rather for being nine (9) days past AEPDA. Had Appellate Counsel correctly addressed the petitioner diligently, the petitioner could have (at the very least) filed a Subpar Writ

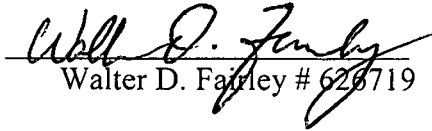
that would have preserved the thirty (30) days allotted an additional amount of days before the federal clock would have started. If the Writ of Extension (which could not have) been filed, this issue would be Moot because the petitioner would be within the time limits by at least thirty (30 to forty-five (45) days

CONCLUSION

For these reasons, a Writ of Certiorari should be issued to review the judgment and opinion of the Fifth Circuit Court.

Date: October 10, 2019

Respectfully Submitted,


Walter D. Fairley # 626719