No. 19-6792

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

VICTOR SANCHEZ -- PETITIONER

Your Name

VS.

PATRICK NOGAN ET. AL. – RESPONDENTS

ON MOTION FOR WRIT OF CERTIORARI TO

FILED
NOV 08 2019
OFFICE OF THE CLERK
SUPREME COURT, U.S.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

(NAME OF COURT THAT AST RULED ON THE MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

VICTOR SANCHEZ

(Your Name)

LOCK BAG – R EJSP

(Address)

RAHWAY NEW JERSEY 07065

(City, State, Zip Code)

N/A

PHONE NUMBER

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SUPREME COURT, U.S.

QUESTION(S) PRESENTED

Where trial counsel admits to ineffective advice that lead to this petitioner being sentenced to (5) five years more time than he would have received in the initial plea offer, should the additional (5) five years be deducted from his sentence in accordance with recent jurisprudence from this court?

In the State of New Jersey where it is overtly clear that the attorneys assigned to criminal defendants by the "New Jersey public defenders office" intentionally manipulates the time; causing procedural bars that will prevent adequate review by higher state and federal courts, should this court assert its authority –tolling the time where this practice occurs-- to insure that constitutional rights to appeal criminal convictions are protected from this malicious practice that is depriving criminal defendant's of their constitutional right to appeal their convictions?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[x] 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:

Patrick Nogan Administrator of East Jersey State Prison
Lock Bag – R EJSP
Rahway New Jersey 07065

Office of The Prosecutor County of Essex
Veterans Courthouse
Newark New Jersey 07102

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OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[x] For cases from **federal courts:**

The opinion of the United States court of appeals at Appendix A to

The petition is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[x] is unpublished.

The opinion of the United States district court appears at Appendix B to

The petition and is

[x] reported at 2019 U.S. Dist. Lexis 3444; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

[x] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at

Appendix E to the petition and is

[x] reported at 233 N.J. 491, 186 A3d. 902, 2018, N.J. Lexis 777; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

The opinion of the New Jersey Appellate court

Appears at Appendix D to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[x] is unpublished.

JURISDICTION

[x] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case Was July 2, 2019.

[ ] No petition for rehearing was timely filed in my case.

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: August 15, 2019, and a copy of the Order denying rehearing appears at Appendix C.

[ ] 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. Sec. 1254(1).

[x] For cases from **state courts:**

The date on which the highest state court decided my case was February 8, 2018. A copy of the decision appears at Appendix E.

[ ] 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. Sec. 1257 (a)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT 6

Rights of the accused.

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 ["Effective Assistance of Counsel for his defense."]

STATEMENT OF THE CASE

Appellant-Petitioner, Victor Sanchez was charged in Essex County Indictment No. 10-09-2073 on count one with murder, a crime of the first degree, contrary to the provisions of N.J.S.A. 2C:11-3a (1) and (2); count two possession of a weapon, a crime of the second degree, contrary to the provisions of N.J.S.A. 2C:39-5b, and count three possession of a weapon for an unlawful purpose, a crime of the second degree, contrary to the provisions of N.J.S.A. 2C:39-4a.

In a pre-trial plea offer, the state advised that it would recommend that a custodial sentence of twenty years subject to the no early release act be imposed if appellant-petitioner entered a guilty plea on count one to an amended charge of first degree aggravated manslaughter, contrary to the provisions of N.J.S.A. 2C:11-4a.

Because of ineffective assistance of counsel, appellant-petitioner did not accept the plea offer. Earlier, after presiding over pre-trial evidentiary hearings, Judge Cifelli ruled that appellant-petitioner's out of court oral statements were not admissible, and that an out of court identification of the appellant-petitioner was admissible.

In pre-trial discovery, initial trial counsel received a video recording purportedly depicting an earlier altercation between appellant-petitioner and the decedent in this case in front of La Parada Restaurant, the scene of the shooting. Initial trial counsel placed the video recording in his trial file. About three months prior to trial, afterwards, he had to recuse himself when it was revealed that he had represented another state's witness involved in the case. Subsequently, new trial counsel was assigned to represent appellant-petitioner. Although receiving the trial file that contained the video recording, newly assigned trial counsel did not view the video until after the trial had commenced.

Appellants' trial began on December 13, 2011. After watching the video, counsel moved for a mistrial. On January 18, 2012, a motion for a mistrial was denied. (1T 29-3 to 17) On January

24, 2012, pursuant to a plea bargain the state agreed to recommend that an aggregate custodial sentence of twenty-five years subject to the No Early Release Act be imposed, accordingly, appellant-petitioner entered guilty pleas on count one to an amended charge of first degree aggravated manslaughter, and on count two to an unlawful possession of a weapon.

On March 2, 2012, on his plea to aggravated manslaughter on count one, appellant-petitioner was sentenced to state prison for a term of twenty-five years subject to (NERA) parole ineligibility and parole supervision. A concurrent term of ten years with a five-year parole ineligibility was imposed on appellant-petitioner's plea to unlawful possession of a weapon on count two. The aggregate custodial sentence imposed was twenty-five years subject to parole ineligibility periods and parole supervision pursuant to the No Early Release Act. Five months later, a notice of appeal was filed on appellant-petitioner's behalf by the office of the public defender on August 1, 2012.

The appeal was limited to sentencing issues and was listed on the Appellate Divisions' Excessive Sentence Oral Argument Calendar for December 10, 2012. On that date, the appellate division affirmed appellant-petitioner's sentence and remanded the matter in order to delete aggravating factor N.J.S.A. 2C:44-1a (6) from the judgment of conviction. An amended judgment of conviction was filed on January 10, 2013.

Appellant-Petitioner filed a pro se petition for post-conviction relief on December 9, 2014. An order assigning counsel was entered, and Judge Cifelli presided over oral arguments on appellant-petitioner's petition on September 17, 2015. On November 20, 2015, Judge Cifelli issued an oral decision denying post-conviction relief. An order denying post-conviction relief was filed on November 20, 2015. A notice of appeal was filed on February 3, 2016. An order permitting appellant-petitioner to file an appeal as within time was entered on February 22, 2016.

1T refers to transcript dated January 18, 2012 (motion).
2T refers to transcript dated January 24, 2012 (plea)
3T refers to transcript dated March 2, 2012 (sentence)
4T refers to transcript dated September 17, 2015 (PCR)
5T refers to transcript dated November 20, 2015 (PCR)

AT TRIAL;

The state's theory of the case was that there was an earlier altercation between the appellant-petitioner and the deceased in front of the Laparda Restaurant, the actual scene of the shooting. A surveillance video recording corroborated the state's theory. (1T 17- 5 to 8) The video recording was given to appellant-petitioner's initial trial counsel in pre-trial discovery; who placed the video recording in his trial file. (1T 7-3; 1T 29-22) Because of a conflict of interest involving the original trial attorney, new counsel was assigned just three months prior to the start of the trial.

Although the newly assigned attorney was given the initial trial file, it was not until after the trial started that he reviewed the video recording. On January 18, 2012, trial counsel conceded that the video recording corroborated the state's theory of the case. He also conceded that the recording contradicted the defense that he presented in his opening statement and undermined his cross-examination of a detective Anthony Sommese concerning the existence of the tape deeming him not credible to the jury; so he ultimately moved for a mistrial. In denying the motion, the trial court found that there had been no discovery violation, and no bad faith by either the state or trial counsel. (1T 25-5)

Subsequently, the trial court was advised that pursuant to a plea bargain in which the state agreed to recommend that an aggregate custodial sentence of twenty-five years subject to NERA parole ineligibility be imposed, appellant-petitioner would enter guilty pleas on count one to an amended charge of aggravated-manslaughter and to unlawful possession of a weapon on count two. (2T 12-

2 to 11). The trial court questioned the appellant-petitioner to determine if he was pleading guilty knowingly and voluntarily. (2T 7-18 to 23-23) Ultimately, the trial court found that an adequate factual basis was established and it found that appellant–petitioner was pleading guilty knowingly and voluntarily. (2T 37-15 to 38-17)

At sentencing, the trial court found three aggravating factors present: the risk that appellant-petitioner will commit another offense, his prior record, and a need for deterrence pursuant to 2C:44-1a 3, 6, and 9. One mitigating factor was found to be applicable: appellant-petitioner's lack of criminal history, pursuant to 2C:44-1b (7), (3T 18-4 to 20-19). After finding that the aggravating factors preponderate over the mitigating factors, the trial court imposed the twenty-five year custodial sentence subject to the NERA parole ineligibility period on count one aggravated manslaughter, and a concurrent ten-year term with a five year parole ineligibility on count two unlawful possession of a weapon. (3T 23-20 to 24-10)

DIRECT APPEAL

Approximately five months after sentencing, a notice of appeal was filed on behalf of appellant-petitioner by the office of the public defender leaving only seven months on appellant-petitioner's one-year time limitation to file a petition for habeas corpus relief. Subsequently, an attorney name Frank Gennaro assigned by the office of the public defender ineffectively limited appellant-petitioner's direct appeal to sentencing issues and the appeal was listed on the Appellate Division's ESOA calendar for December 10, 2012. The appellate division affirmed appellant-petitioner's sentence and remanded the matter in order for the trial court to delete aggravating factor 2C:44-1a (6) from appellant-petitioner's judgment of conviction on that date. On December 18, Jodi Ferguson of the Office of the Public Defender, corresponded with appellate-petitioner stating: "You can, if you wish, proceed to the next level of appeal, and ask the New Jersey Supreme

Court to review your case. The Supreme Court is not required to take every case, but we can file a petition for certification to try to persuade the Justices that they should accept your appeal. Also, should you not proceed to the Supreme Court you will be precluded from proceeding further in the United States Federal Courts." On January 11, 2013, Jodi Ferguson of the (OPD) corresponded again to appellant-petitioner stating: "I write in response to your January 2, 2013 letter. As I explained in my prior letter, neither Mr. Gennaro nor my office will file a notice of petition for certification for you because your case presents no viable legal issue that the New Jersey Supreme Court is likely to consider pursuant to R.2:12-4. If you disagree with this decision, you may write your own petition asking the Supreme Court to review your case." "You have 20 days from the date on the first page of the Appellate Division's Order to file your Notice Of Petition with the New Jersey Supreme Court. You have an additional 10 days after the notice is filed or 30 days after the entry of the final judgement to file the actual petition asking the court to hear your case pursuant to R. 2:12-3; 2:12-17(b). Please note that the court will accept late filings, with an explanation. If you need our help with a late filing, please contact us. (A sample Notice of Petition and Letter Petition, as well as motion for late filing are enclosed for your use."

Subsequently, on January 25, 2013, appellant-petitioner received a letter from the attorney Frank Gennaro stating: "I am in receipt of your letter. Please be advised that the time for argument as to your sentence is done. All issues relating to your sentence were argued before the appellate court, and that court has made its ruling. It is not possible to present new arguments to the appellate division. When you go back to the trial court, you should ask your attorney to make any argument that you feel is necessary."

Afterwards, in a subsequent correspondence to appellant-petitioner from Jodi Ferguson, she stated: "We had an in-person conversation with your mother, who came to the office, and a

translator was present on October 2, 2013. From that conversation, we gleaned that you wanted a status as to the remand that was directed by court order from the sentence Oral Argument that occurred on December 10, 2012, and on a pending motion filed with the New Jersey Superior Court, Law Division, Criminal Part. Please be advised that the judgement of conviction was amended to delete aggravating factor number 6 as ordered by the court. We have enclosed a copy of the appellate Division order filed December 13, 2013 and the amended judgement of conviction filed January 10, 2013 for your records." The direct appeal attorney/public defender's office, totally abandoned this petitioner; without even exhausting his claims to the highest state court. Intentionally doing so, this petitioner would be procedurally barred from having his claims reviewed by a federal court.

POST-CONVICTION RELIEF

Appellant-Petitioner argued that his second attorney assigned by the (OPD) was ineffective for being unaware of the video-recorded surveillance tape that was in counsel's trial file until it was discovered during trial. Appellant-Petitioner argued that had trial counsel known about the video recording prior to trial and informed him of its existence, he would have accepted the state's initial plea of twenty years. He further argued that trial counsel was ineffective during the sentencing hearing because he failed to present as a non-statutory mitigating factor that appellant-petitioner was unaware of the existence of the surveillance video recording when the initial plea bargain was rejected.

In denying the petition, the court noted that the trial counsel was provided with full discovery, including the video recording. The PCR court also noted that despite trial counsel's ignorance of the presence of the tape in the file, a police report provided to trial counsel in discovery "clearly indicated the existence of the video." (5T 13-15) Accordingly, since trial

counsel was on notice that a surveillance video existed, in denying appellant-petitioner's application for PCR, the court attributed trial counsel's conduct to "strategic decisions" (5T 13-18) In addition, the PCR court found that appellant-petitioner's claim that he would have accepted the state's initial plea bargain of twenty years to be nothing more than an uncorroborated "bold assertion" (5T 14-3 to 21)

With regard to appellant-petitioner's claim that trial counsel was ineffective in failing to present a non-statutory mitigating argument at sentence, in denying post-conviction relief, the PCR court found the argument to be "unpersuasive," "flawed," and "unsupported by any credible evidence." (5T 17-20)

In summarily denying appellant-petitioner's claims without conducting an evidentiary hearing, the PCR court found that appellant-petitioner failed to make a prima facie showing of ineffective assistance of counsel under the Strickland test.

POINT I

PETITIONER'S 6TH AMENDMENT CONSTITUTIONAL RIGHT TO EFFECTIVE COUNSEL DURING PRE-TRIAL, AND TRIAL STAGES, HAS BEEN VIOLATED AS A RESULT OF TRIAL COUNSEL'S INEFFECTIVE ADVICE THAT HAS COST HIM AN ADDITIONAL FIVE YEARS ON HIS SENTENCE.

The Supreme Court has recognized that the Sixth Amendment guarantees a "right to counsel at all critical stages of the criminal process." Iowa v. Tovar, 541 U.S. 77, 80-81, 124 S. Ct. 1379, 158 L. Ed. 2d 209 (2004). That right extends beyond trial to sentencing. Lafler v. Cooper, 566 U.S. 156, 165, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012).

The right to counsel protects more than just trial verdicts. It also protects plea-bargaining, in part because poor bargaining can lead to heavier sentences and deportation. Lafler, 566 U.S. at 163-66; Missouri v. Frye, 566 U.S. 134, 143-44, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012); Padilla v. Kentucky, 559 U.S. 356, 366, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010). And it protects sentencing because "'any amount of [additional] jail time has Sixth Amendment significance.'" Lafler, 566 U.S. at 165 (quoting Glover v. United States, 531 U.S. 198, 203, 121 S. Ct. 696, 148 L. Ed. 2d 604 (2001)). Defendants have a right to counsel to protect them from over-punishment as well as from wrongful conviction.

Here, Appellant-Petitioner outlined in a certification in support of his post-conviction relief petition the following:

> I was unaware that my first trial attorney . . . had been given a video from Laparda Restaurant, showing the altercation that occurred before the shooting.
>
> If I had been given an opportunity to view the video prior to trial, I would not have proceeded to trial and would have accepted the earlier plea offer of twenty years.

In the law division brief, PCR counsel further explained how trial counsel's ignorance of the presence of the tape in his own file was "devastating" to the defense and why it constituted a prima facie claim of ineffective assistance of counsel:

> The defense at trial was an attack on the witnesses that established Victor Sanchez as the shooter. Because the video of the shooting confirmed that the shooter had his face covered, the "identification" of Mr. Sanchez was based, largely, on the earlier fight. Counsel chose to attack the credibility of the witnesses to the fight as a way of attacking the "identification" of Mr. Sanchez as the shooter. He brought into question "whether or not any fight took place on that particular night." (1T 16-1 to 2) The video of the earlier altercation shows appellant-petitioner's face visible and wearing the same clothes as the shooter. (1T 17-5 to 8) This was "devastating" to

> counsel's plan of attack, leaving petitioner with little if no defense at all.

Mr. Sanchez submits that if counsel was fully aware of the discovery and counseled him accordingly, he would have reasonably accepted the earlier plea offer of twenty years.

In denying appellant-petitioner's (PCR), the court found that trial counsels' opening statement and trial counsel's cross-examination cited by trial counsel, as proof of his deficient representation of appellant-petitioner did not amount to ineffective assistance of counsel because they were "strategic decisions." The (PCR) court reasoned that they were strategic decisions because regardless of trial counsel's ignorance of the presence of the video recording in his file, he was nevertheless aware of its existence since, in discovery, he was provided with a police report in which detective Sommese acknowledged its' existence. (5T 13-5 to 18)

Contrary to the PCR courts' belief, the deficient performance that resulted from trial counsel's failure to investigate what was in his own file and to view the video recording prior to trial cannot be attributed to a legitimate strategic decision since trial counsel's following representations made during the motion for mistrial were inconsistent with the (PCR court's finding:

> So it's now an issue where I have challenged these people's credibility. Had I seen the tape of it, Judge, I'm not going to go there. I'm not going to open to something where all of a sudden it's going to be thrown down my throat saying what the hell is this man talking about. . . but Judge, I have opened. I have opened to these people being suspect about what they observed on the October 17, 2009, day. Well, Judge, now all of sudden, based upon this tape, which I found out on Thursday exist, I'm now in a position where my credibility in front of this jury is lost, and that's why I'm asking for a mistrial, Judge. In essence, I think its ineffective assistance of counsel opening up to an argument that I would not have made, Judge, had I been provided with the tape. . . (5T 11-22 to 5T 23-19)

In denying appellant-petitioner's (PCR), the trial court found that the claim that, had he been aware of the video recording he would not have proceeded to trial and would have instead entered a guilty plea, was nothing more than a "bald assertion" unsupported by corroborating proof. (5T 14-21) The court found that the reason why appellant-petitioner entered a guilty plea after the mistrial motion was denied was because he "underestimated the strength of the state's case." (5T 17-8)

Appellant-Petitioner submits to this court; that his trial counsel's ineffective assistance of counsel has cost him an additional five years on his sentence in violation of his 6th amendment constitutional rights to effective trial counsel. Consequently, he further submits that upon review of his convictions by this court, it should be found that his convictions are in violation of recent "United States Supreme Court Jurisprudence," and therefore, cannot stand. Justice and due process would demand no less.

POINT II

THE TIME FOR FILING A HABEAS PETITION SHOULD BE EQUITABLY TOLLED AND APPELLANT-PETITIONER SHOULD NOT BE PROCEDURALLY BARRED, BECAUSE HE HAS DILIGENTLY PURSUED HIS RIGHT TO APPEAL HIS CONVICTIONS DESPITE THE INEFFECTIVE COUNSEL HE RECEIVED FROM SEVERAL ATTORNEYS, ALL THE WHILE DEMONSTRATING SUBSTANTIAL VIOLATIONS OF CONSTITUTIONAL RIGHTS.

Federal habeas corpus is a backstop. It lets federal courts review the merits of federal claims in state criminal cases. But federal courts do not sit to review state law. So federal courts will not review federal claims when the state court's decisions are supported by a state-law reason, an independent and adequate state ground. One such ground is a violation of the state's procedural rules. The federal habeas statute requires state prisoners to exhaust their state remedies before pursuing federal habeas relief. 28 U.S.C.S. 2254(b) (1). So when the state court denies a claim

because the prisoner failed to comply with a procedural rule, that procedural default normally bars federal courts from rehearing the claim.

A federal habeas court may excuse a prisoner's procedural default if the prisoner can show both cause for the default and resulting prejudice. To show cause, he must explain what prevented him from timely raising the defaulted claim. Ineffective assistance of counsel is one such cause: an objective factor external to the defense that can excuse procedural default. When the state prosecutes, convicts, and imprisons a defendant, it must ensure that the defendant has the assistance of counsel for his defense. U.S. Const. amend. VI. If the state provides no lawyer or an ineffective one, it violates that obligation. No state may conduct trials at which persons who face incarceration must defend themselves without adequate legal assistance. If the state violates this rule, its violation is cause to excuse the defendant's procedural default.

To preserve claims of trial-counsel ineffectiveness, the U.S. Supreme Court carved out a narrow exception to procedural default. Martinez v. Ryan 566 U.S. 1, 132 S.Ct. 1309 182 L.Ed 2d 272 (2012) permits prisoners to bring their claims of ineffective assistance of trial counsel on federal habeas even if their state-habeas counsel failed to raise that claim. So even though the right to counsel does not extend to state-habeas proceedings, the lack of effective counsel there does not prevent prisoners from later raising the ineffectiveness of their trial counsel. Martinez's equitable exception applies to states that require prisoners to await state habeas to raise ineffective-assistance claims. It also applies to states, like New Jersey, whose procedures do not strictly bar earlier review but typically do not afford an opportunity to raise ineffective-assistance claims until state habeas.

To qualify for Martinez v. Ryan's exception, a habeas petitioner must show (1) that the procedural default was caused by either the lack of counsel or ineffective counsel on post-conviction review; (2) that this lack or ineffectiveness of counsel was in the first collateral

proceeding when the claim could have been heard; and (3) that the underlying claim of ineffective assistance of trial counsel is substantial. A federal court's power to grant a writ of habeas corpus is governed by 28 U.S.C. 2254(d), which provides:

(d) 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 with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. 2254(d).

The Supreme Court construed 2254(d) in Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). With respect to the "contrary to" language, a majority of the Court held that a state court decision is contrary to clearly established Federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law" or if "the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." Williams, 529 U.S. at 413, 120 S. Ct. 1523. Under the "unreasonable application" prong of 2254(d) (1), a writ may issue if "the state court identifies the correct governing legal rule from [the Supreme Court's] cases but unreasonably applies [the principle] to the facts of the particular state prisoner's case." Id. Thus, "a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." Id. at 409, 120 S. Ct. 1521. Although the Court failed to specifically define "objectively unreasonable," it observed that "an unreasonable

application of federal law is different from an incorrect application of federal law." Id. at 410, 120 S. Ct. 1522.

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), "Congress established a 1-year statute of limitations for seeking federal habeas corpus relief from a state-court judgment, 28 U.S.C. 2244(d), and further provided that the limitations period is tolled while an 'application for State post-conviction or other collateral review' is pending." Lawrence v. Florida, __ U.S. __, 127 S. Ct. 1079, 1081, 166 L. Ed. 2d 924 (2007), quoting 28 U.S.C. 2244(d) (2). To extend the limitations period, the state post-conviction application must be properly filed. Pace v. DiGuglielmo, 544 U.S. 408, 417, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005) (If the state court rejected petitioner's post-conviction application "as untimely, it was not 'properly filed,' and he is not entitled to statutory tolling under 2244(d) (2)"). The limitations period also is tolled by a state-created impediment violating the Constitution or federal law. 28 U.S.C. 2244(d) (1) (B). This court reviews the district court's interpretation of the one-year AEDPA limitation de novo. Walker v. Norris, 436 F.3d 1026, 1029 (8th Cir. 2006); Jackson v. Ault, 452 F.3d 734, 735 (8th Cir. 2006) (reviewing legal conclusions de novo and factual findings for clear error).

"To be entitled to equitable tolling, [petitioner] must show (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." Lawrence, __ U.S. __, 127 S. Ct. at 1085 (assuming without deciding that 2244 allows for equitable tolling). "Equitable tolling is proper only when extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time." Kreutzer v. Bowersox, 231 F.3d 460, 463 (8th Cir. 2000). "Equitable {491 F.3d 428} tolling is an exceedingly narrow window of relief." Maghee v. Ault, 410 F.3d 473, 476 (8th Cir. 2005).

"Serious attorney misconduct," as opposed to mere negligence, may warrant equitable tolling in some circumstances. United States v. Martin, 408 F.3d 1089, 1093 (8th Cir. 2005) (citing Spitsyn v. Moore, 345 F.3d 796, 798 (9th Cir.2003).

The Supreme Court has recognized that attorney error can constitute extraordinary circumstances for purposes of equitably tolling the AEDPA deadline. Holland v. Florida 560 U.S. at 650-52. Holland was overruled just a few years later in Maples v. Thomas, 565 U.S. 266, 132 S. Ct. 912, 181 L. Ed. 2d 807 (2012). Maples relied on agency principles to excuse procedural default when an attorney abandons their client but not when they are merely negligent and cites Holland as instructive on that issue. Id. at 281-82. Whether Maples alters Holland this way is a subject of debate among the circuits. The Second Circuit has said it does, holding that Maples means attorney wrongdoing must rise to effective abandonment an act that severs the agency relationship to constitute extraordinary circumstances in the equitable tolling setting. Rivas v. Fischer, 687 F.3d 514, 538 n.33 (2d Cir. 2012). A divided panel of the Eleventh Circuit initially held that too. Cadet v. Florida Dept. of Corrections, 742 F.3d 473, 480-81 (11th Cir. 2014). But after en banc petitioning, it issued a revised opinion. 853 F.3d 1216, 1218 (11th Cir. 2017). That opinion reiterates that attorney error, however egregious, cannot warrant equitable tolling again relying on Maples and its agency rationale. Id. at 1226-27. But it notes that misconduct other than abandonment may amount to extraordinary circumstances. Id. at 1227. Finally, the Ninth Circuit has said it is unclear whether the Supreme Court intended to hold in Maples that attorney misconduct short of abandonment can no longer serve as a basis for equitable tolling. Luna v. Kernan, 784 F.3d 640, 648-49 (9th Cir. 2015). But because Maples did not explicitly overrule Holland, it ruled that Holland's holding that egregious attorney misconduct of all stripes may serve as a basis for equitable tolling remains good law. Id. at 649.

REASON FOR GRANTING THE PETITION

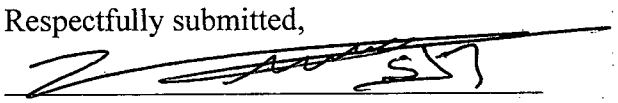
The right to counsel protects more than just trial verdicts. It also protects plea-bargaining, in part because poor bargaining can lead to heavier sentences and deportation; and it protects sentencing because "'any amount of [additional] jail time has Sixth Amendment significance.'" Defendants have a right to counsel to protect them from over-punishment as well as from wrongful conviction. Here, a state court has decided an important question of federal law in a way that conflicts with decisions of both this court and the United States Court of Appeals.

Moreover, to be entitled to equitable tolling, [petitioner] must show (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way, and prevented a timely filing. "Equitable tolling is proper only when extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time." Clearly here, petitioners' ineffective attorney's intentionally made it impossible for him to file a timely Habeas petition, and the United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter; and has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this court's supervisory power.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,



Date: November 7, 2019