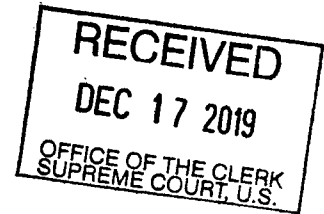


ORIGINAL

No. 19-7087



IN THE
SUPREME COURT OF THE UNITED STATES

ANTHONY MAY,

Petitioner,

V.

ADMINISTRATOR NEW JERSEY STATE PRISON; ET AL,

Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals,
For The Third Circuit

C.A. No: 19-2274
D.N.J. Civ. No: 2-16-cv-00190

PETITION FOR WRIT OF CERTIORARI

Mr. Anthony May, Pro-Se
#414913 / SBI # 312367-B
New Jersey State Prison
P.O. Box 861
Trenton, New Jersey 08625

QUESTIONS PRESENTED

Mr. May make leave to appeal the following issues:

- 1) . WHETHER PETITIONER'S "MENTAL RETARDATION" AND "LOW IQ" "EXTRAORDINARY CIRCUMSTANCES" IN WHICH "EQUITABLE TOLLING" SHOULD BE APPLIED TO AVOID A MANIFEST INJUSTICE? (District Court op. at *7-8; 13-20).
- 2) . WHETHER BOTH THE DISTRICT COURT AND STATE COURT'S ERRED BY STATING THAT DEFENDANT WAS NOT DEPRIVED EFFECTIVE ASSISTANCE OF COUNSEL

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:

Kayla Elizabeth Rowe, Esq.
Essex County Prosecutor's Office
Veteran's Courthouse
50 Market Street, 3rd Floor
Newark, New Jersey 07102
Attorney For Respondents: Administrator of New Jersey
State Prison and Attorney General of New Jersey

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Appendix B: The Order and Opinion of the United States District Court for the District of New Jersey filed May 10, 2019, May v. Johnson, No: 2-16-cv-00190 (D.N.J.)

Appendix C: The Unpublished Opinion of the New Jersey Superior Court, Appellate Division affirming the denial of PCR in State v. May, App. Div. Docket No. A-3735-13T3; decided May 6, 2015; 2015 WL 2070061 (Certification was denied, 122 A.3d 991 (2015)).

Appendix D: The Unpublished Order of the New Jersey Superior Court, Law Division in State v. May, Indictment No: 99-07-2630; decided October 7, 2013. (Written Order and Opinion Denying Post-Conviction Relief)

TABLE OF AUTHORITIES

Cases Cited

Holland v. Florida, 130 S.Ct. 2549 (2010)

May v. Administrator New Jersey State Prison, et. al
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Nara v. Frank, 264 F.3d 310 (3d Cir. 2001)

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State v. May, Indictment No: 99-07-2630; decided October 7, 2013.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Anthony May respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeal for the Third Circuit denying his Application for a Certificate of Appealability on Appeal from the United States District Court for the District of New Jersey.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Third Circuit Denying Request for a Certificate of Appealability filed November 13, 2019, May v. Administrator New Jersey State Prison, et. al (C.A. 19-2274) (3d Cir.) is attached herein (Appendix A).

The Order and Opinion of the United States District Court for the District of New Jersey filed May 10, 2019, May v. Johnson, No: 2-16-cv-00190 (D.N.J.) is attached herein (Appendix B).

The Unpublished Opinion of the New Jersey Superior Court, Appellate Division in State v. May, App. Div. Docket No. A-3735-13T3; decided May 6, 2015 is attached (Appendix C).

The Unpublished Order of the New Jersey Superior Court, Law Division in State v. May, Indictment No: 99-07-2630; decided October 7, 2013. (Written Order and Opinion Denying Post-Conviction Relief) (Appendix D)

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The decision of the United States Court of Appeal for the Third Circuit denying the application for a certificate of appealability was denied on November 13, 2019.

CONSTITUTIONAL PROVISIONS

The relevant parts of the Fifth Amendment provides, in pertinent part, that: "No person shall be . . . compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law."

The relevant parts of the Sixth Amendment is: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the Assistance of Counsel for his defence."

The relevant part of the Eighth Amendment is: "Excessive bail shall not be required, . . . nor cruel and unusual punishments inflicted."

The relevant part of the Fourteenth Amendment (Section 1) is: "No State shall deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

A. Introductory Statement

It cannot be overemphasized that the United States Court of Appeals for the Third Circuit found that "jurists of reason would agree, without debate, that Appellant's habeas petition was untimely and that his claims were meritless, and that the District Court did not err in denying Appellant's request for an evidentiary hearing, as his claims could properly be addressed on the record," however, the Circuit Court decision was erroneous.

The United States District Court for the District of New Jersey denial of Petitioner's habeas corpus petition as untimely filed was also erroneous.

Additionally, the United States District Court for the District of New Jersey denying Petitioner's Claims raised on Habeas Corpus were also erroneous.

B. Procedural History and Statement of Facts

This Appeal stems from the November 13, 2019 Order of the United States Court of Appeals for the Third Circuit denying an application for a Certificate of Appealability and from the May 10, 2019 Order of the United States District Court for the District of New Jersey, denying Petitioner's Habeas Corpus Petition as Untimely. Petitioner argues that the Court of Appeals was in error when it agreed with the District Court that the Petition was Untimely filed and the District Court also erred when it denied the Petition on Time-barred grounds.

This case arose based upon allegations that Mr. Mays broke into the home of two elderly people and murdered them while in the act of burglarizing their homes. As a result of these allegations, on July 19, 1999, the Essex County Grand Jury returned Indictment Number 99-07-2630, charging Anthony May, with violating the following N.J. offenses: **Counts One and Seven:** First-degree Murder of Olga Schwab and Robert Wang, contrary to N.J.S.A. 2C:11-3a(1)(2); **Counts Two and Eight:** First-degree felony murder of Olga Schwab and Robert Wang, contrary to N.J.S.A. 2C:11-3a(3); **Counts Three and Nine:** Second-degree burglary of the premises of Olga Schwab and Robert Wang, contrary to N.J.S.A. 2C:18-2; **Counts Four and Ten:** First-degree armed robbery of Olga Schwab and Robert Wang, contrary to N.J.S.A. 2C:15-1; **Counts Five and Eleven:** first-degree Unlawful Possession of a weapon contrary to N.J.S.A. 2C:39-5d; and **Counts Six and Twelve:** Third-degree possession of a weapon for an unlawful purpose contrary to N.J.S.A. 2C:39-4d.

On November 2, 2000, defendant appeared before the Hon. Richard C. Camp, J.S.C., and entered a guilty plea to COUNT TWO: first-degree felony murder; COUNT THREE, second-degree burglary, COUNT FIVE, fourth-degree unlawful possession of a weapon, COUNT EIGHT, first-degree felony murder, COUNT NINE, second-degree burglary, and COUNT ELEVEN, fourth-degree unlawful possession of a weapon. In exchange, the State agreed to dismiss the remaining 6 counts and three other pending Indictments. The State agreed to

recommend a 30-year term of imprisonment for each of the Counts charging felony murder of the two victims to run concurrent to each other, with 60-years without parole. On this same date, Mr. May also signed a Plea Agreement form. During the plea proceeding, Mr. May stated that he was currently under the influence of drugs to control his reactions.

Defendant was subsequently sentenced on December 15, 2000 to two consecutive thirty-year sentences with 30 years each of parole ineligibility for a total of 60 years without parole.

The Defendant then filed an Appeal of the sentences which was placed on the excessive sentencing oral argument calendar. On April 10, 2001, the Appellate Division affirmed the sentence; State v. May, A-2693-00T4. A Petition for Certification was filed and denied by the N.J. Supreme Court; State v. May, 170 N.J. 85 (2001).

On February 3, 2012, defendant filed a first Petition for PCR challenging his conviction. Counsel was assigned and filed a Brief in Support of said petition on July 15, 2013. On September 16, 2013, the Hon. Patricia K. Costello, A.J.S.C., denied the Petition and formalized its decision in a written opinion and order dated October 7, 2013. On May 6, 2015, the Appellate Division affirmed the PCR Court's decision; State v May, A-3735-13T3, 2015 N.J. Super. Unpub. LEXIS 1043. On October 9, 2015, the N.J. Supreme Court denied Certification, State v. May, 223 N.J. 281 (2015).

On January 12, 2016, the defendant filed a Petition for Habeas Corpus, in which he raised three grounds for consideration.

On May 18, 2016, the U.S. District Court issued an order pursuant to Ukawabutu v. Morton, 997 F.Supp. 605 (D.N.J. 1998); R. 5 of the Rules Governing Section 2254 Cases ("Habeas Rules") requiring the Respondents to file their Answer.

While the Habeas Petition was pending in the Federal Court, Defendant filed a Petition for PCR in the state trial court. The Petition was filed on September 26, 2017 in the Essex County Superior Court, Law Division.

On August 21, 2018, Judge Batista denied Defendant's Petition for PCR as Time-Barred and on its Merits. The Judge issued a Written Opinion as well as a signed Order. An Appeal was filed with the Superior Court of New Jersey, Appellate Division, which at the time of printing, is still pending.

On May 10, 2019 (Filed on May 14, 2019), the Honorable Madeline Cox Arleo, U.S.D.J. denied the Petition as Time-Barred and on the Merits and declined to issue a Certificate of Appealability. An Appeal was filed with the District Court and on November 13, 2019, the United States Court of Appeals for the Third Circuit denied to issue a Certificate of Appealability.

This Application now follows and presents Constitutional issues that should be resolved by this Honorable High Court.

REASONS FOR GRANTING THE WRIT

I

WHETHER PETITIONER'S "MENTAL RETARDATION" AND "LOW IQ" "EXTRAORDINARY CIRCUMSTANCES" IN WHICH "EQUITABLE TOLLING" SHOULD BE APPLIED TO AVOID A MANIFEST INJUSTICE? (District Court op. at *7-8; 13-20).

On May 10, 2019, the District Court had ruled that Petitioner's Habeas Petition was Time-Barred and the Third Circuit Court of Appeals declined to issue a COA to hear the case. Petitioner argues that the Courts committed an error.

On July 13, 2007, the Petitioner filed his first Petition for Post-Conviction Relief. Petitioner was then assigned an attorney under N.J. Rule 3:22-6(a); see also State v. Rue, 175 N.J. 1, 16-17 (2002).

The thrust of Mr. May's Petition for PCR maintained that he failed to receive adequate legal representation at the trial level by Counsel's failure to conduct a thorough investigation before developing a theory of defense or advising defendant to plead guilty. Defense counsel failed to arrange for Mr. May to be evaluated by a psychiatrist or psychological expert to determine his competency to stand trial; failed to explore and pursue a diminished capacity defense and failed to pursue a motion to suppress Mr. May's confession. The PCR Court denied Mr. May's contention on its substantive merits, but also concluded he was not even entitled to an evidentiary hearing.

The record before the PCR court showed that the Court erred in not granting Mr. May an evidentiary hearing to address the merit's of his Petition. In viewing the evidence, the record showed that he had at least established a prima facie claim to PCR and was entitled to an evidentiary hearing. Specifically, Mr. May established a prima facie case that his trial counsel was ineffective for failing to conduct a thorough investigation into his mental competency. This investigation was an absolute necessity prior to defense developing a legal theory and strategy of the case only with such an expert opinion of Mr. May's competency could defense adequately advise Mr. May regarding the best strategy and legal defense. As a result of counsels failure to undertake a reasonable investigation and explore the best pre-trial and trial strategy based on an expert psychiatric opinion of Mr. May's diminished capacity, Mr. May suffered prejudice and was denied his right to effective assistance of counsel.

The core issue of Mr. May's defense was what impact his limited cognitive functioning had on his ability to understand and participate in the criminal proceedings, both before and after he was formally charged. The record was undisputed that Mr. May was clinically labeled mentally retarded throughout his years in the school system and still currently suffers from severe cognitive limitations. The CVA Consulting Services Report attached to the Judgment of Conviction indicated a long

documented history of such a classification and that his cognitive limitations were severe. ("CVA Report" was submitted to the District Court on Mr. May's Petition for Habeas Corpus. This Report was also "ealed as Confidential.") The Report refers to an evaluation conducted by Dr. Ralph F. Brandon, Neuro-Psychiatrist, in December 1980. Dr. Brandon indicated that Mr. May was "functioning in the educable mentally retarded range." Dr. Brandon recommended that he be placed in a class for the mentally retarded. The Report also indicated that Mr. May "had severe learning disabilities." He was classified as mentally retarded throughout high school. Further, even the PCR Court acknowledged defendant's mental limitation when he referred to defense counsel's and the trial court's awareness of Mr. May's "limitations" and "low IQ."

The PCR Court erroneously found that defendant's alleged confession and guilty plea were made knowingly. The PCR Court stated that the confession was provided with vivid details and that Mr. May indicated that he understood the plea form that he signed. In addition, the PCR Court found that Mr. May understood and assisted his attorney in his defense. Therefore, the PCR Court found defendant to be legally competent pursuant to N.J.S.A. 2C:4-4(a) and (b). Regardless of the findings of the PCR Court, Mr. May's competence and its impact on his confession, guilty plea and legal defense was at the core of the matter. With

the aid of an expert psychological or psychiatric opinion, trial counsels could even have sought to have the indictment against Mr. May dismissed pursuant to N.J.S.A. 2C:4-6c or at the least, argue a diminished capacity defense.

For Petitioner to obtain relief, there must be a causal connection, or nexus, between the extraordinary circumstances he faced and the failure to file a timely federal petition. See, Nara v. Frank, 264 F.3d 310, 320 (3d Cir. 2001) (The alleged extraordinary circumstances "must somehow have affected the petitioner's ability to file a timely habeas petition"), see also Holland v. Florida, 130 S.Ct. 2549, 2563 (2010) (A Petitioner must show that "some extraordinary circumstances stood in his way and prevented timely filing").

The nexus test is met because the extraordinary circumstances that Mr. May faced directly prevented him from timely pursuing his state court remedies and filing a statutorily timely habeas petition. Therefore, it is appropriate in this case to equitably toll the running of the AEDPA's one-year statutory limitation period and to reverse the District Court's order.

Petitioner contends that he has proffered evidence that he had suffered and continues to suffer from a mental defect that prevents him from understanding the situation at hand, thus

preventing him from being able to timely file any document with any court.

II

WHETHER BOTH THE DISTRICT COURT AND STATE COURT'S ERRED BY STATING THAT DEFENDANT WAS NOT DEPRIVED EFFECTIVE ASSISTANCE OF COUNSEL

PCR Counsel failed to investigate an effective defense as he proceeded with the PCR Petition without even attempting to obtain a psychological or psychiatric expert to evaluate Mr. May. Given that mental retardation is a chronic condition with little or no change, such an evaluation at the time of the PCR Proceeding would have shed significant light on Mr. May's competency at the time of his plea. Without such an evaluation into Mr. May's competence, the PCR application was sadly lacking. At the PCR hearing, PCR Counsel requested an extension to have an expert evaluation done of Mr. May, so he could submit a thorough argument. The PCR Court denied this request stating as follows:

"Defendant's assertion of ineffective counsel due to trial counsel's alleged failure to suppress both confessions is without merit. No evidence has been proffered regarding the defendant's diminished mental capacity at the time of the Mirandized statements. The defendant has not provided this Court with a single medical record, test result, or treatment report that would substantiate defendant's assertion. Additionally, the defendant alleges he was classified as being "slow" in grammar school, but he did not provide any school records or evaluations that speak to a learning disability. Moreover, the defendant did not support his asserted incapacity with a single

affidavit from a family member or from his trial counsel.

PCR Counsel argued that the lost public defender file made it exceedingly difficult for counsel to prepare the defendant's PCR. However, the lost file does not excuse the lack of a single supporting document. PCR counsel was assigned on May 3, 2012 and his brief was submitted on July 13, 2013, 14 months later. If any supporting document did indeed exist, it should have been provided as PCR Counsel had 14 months to prepare defendant's case."

It was inexcusable that absolutely no evidence was presented of Mr. May's cognitive limitations. It was clear that he suffered from mental retardation. PCR Counsel cannot argue that documents of his limitation did not exist as it was clearly presented at the sentencing hearing. At sentencing, as previously noted, the defense submitted a Report from CVA Consulting with a summary of prior evaluations, those who were interviewed, school records reviewed and medical records reviewed. This CVA Report was submitted into evidence and attached to the Judgment of Conviction, therefore, the sentencing Court deemed it a relevant piece of evidence in the record. PCR Counsel at the minimum should have requested an updated evaluation to be conducted to determine the current status of Mr. May's mental state and I.Q. level.

It is true that there were delays caused because trial counsel had lost the trial file and PCR Counsel could not arrange for an evaluation without all necessary discovery documents. The prosecutor, after being requested and a motion to compel being

filed, did provide the discovery documents to PCR Counsel in June of 2013. This was approximately three months before the PCR hearing. Although the PCR Court denied defendant's request for an extension, the Court offered to allow defendant to withdraw the PCR Petition and refile it when any and all investigations and evaluations were complete. The filing date of any re-filed PCR Petitions would be effective as of Mr. May's original filing date of Feb. 3, 2012. PCR counsel discussed this option with Mr. May, and albeit, with Mr. May's consent, chose to proceed on the existing PCR Petition. This offer would have allowed Mr. May to timely arrange for an evaluation into his competence and for a more thorough and persuasive PCR Petition. By refusing the offer, defense counsel's actions prejudiced Mr. May as evidenced by the denial of the PCR Petition.

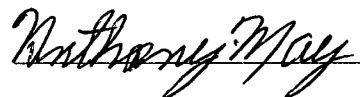
CONCLUSION

For the foregoing reasons, the Petitioner Anthony May respectfully requests this Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

12-17-19

Dated:


Anthony May, Pro-Se